IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1933

UNITED STATES OF AMERICA,
Appellant,

v.

THE CITIZENS AND SOUTHERN NATIONAL BANK, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR APPELLEES

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INDEX

TABLE OF CITATIONS

Cases

Statutes

Rules

Miscellaneous

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-69a) is reported at 372 F. Supp. 616.

JURISDICTION

This action was brought under section 15 of the Clayton Act, as amended, 15 U.S.C. § 25. The judgment of the district court was entered on January 25, 1974 (J.S. App. 69a)

and the notice of appeal to this Court was filed on March 25, 1974 (J.S. App. 73a-74a). Probable jurisdiction was noted on October 21, 1974 (App. E-1842). The jurisdiction of this Court is predicated on section 2 of the Expediting Act of February 11, 1903, as amended, 15 U.S.C. § 29.

STATUTES INVOLVED

Section 1 of the Sherman Antitrust Act, as amended, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, provides in pertinent part:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> . . . .
>
> ". . . Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of

such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Section 5 of the Bank Merger Act of 1966, as amended, 12 U.S.C. § 1828(c)(5), provides in pertinent part:

"The [Federal Deposit Insurance Corporation] . . . shall not approve—

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the [Federal Deposit Insurance Corporation] . . . shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."

Section 2(d) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841(d), provides in pertinent part:

" 'Subsidiary,' with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is directly or indirectly owned or controlled by such bank holding company, or is held by it with power to vote; (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company with respect to the management or policies of which such bank

holding company has the power, directly or indirectly, to exercise a controlling influence, as determined by the Board, after notice and opportunity for hearing."

Section 3(a) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(a), provides in pertinent part:

"It shall be unlawful, except with the prior approval of the Board, . . . (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company."

Sections 5(a) and 5(b) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1844, provide in pertinent part:

"(a) . . . [E]ach bank holding company shall register with the Board on forms prescribed by the Board, which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related matters, as the Board may deem necessary or appropriate to carry out the purposes of this chapter. . . .

"(b) The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof."

Section 9 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1848, provides in pertinent part:

"Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside."

Section 11(d) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1849(d), provides in pertinent part:

> "Any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this amendment [July 1, 1966], shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of the . . . [Sherman Act]."

QUESTIONS PRESENTED

An urban bank, in order to retain the business of those of its customers who had moved to the suburbs, without violating a state law that forbade the bank to open branch offices there, devised the following approach: It organized new banks in the suburbs, taking back a five percent stock interest in each new bank (the maximum allowed by state law) and providing each bank with staff, advice, and guidance. The new banks used the name and distinctive logogram of the organizing bank and were identified in the public mind as branches of that bank. The stockholders of the new banks anticipated that the banks would be formally acquired by the organizing bank if and when state law was liberalized. In the interim, the several banks involved competed mainly with the other banks in their markets rather than with each other. The questions presented are:

1. Whether the foregoing course of conduct constituted, as a matter of law, a *per se* violation of section 1 of the Sherman Act.

2. Whether that issue was within the primary jurisdiction of the Federal Reserve Board.

3. Whether the formal acquisition of the banks by the organizing bank would be likely to lessen competition substantially, in violation of section 7 of the Clayton Act.

4. Whether the conduct described is immune from challenge under the antitrust laws by virtue of either (a) the grandfather clause of the Bank Holding Company Act or (b) the subsidiary exemption in section 7 of the Clayton Act.

STATEMENT

Introduction

The Department of Justice brought this civil antitrust suit to enjoin (1) the proposed acquisition of five small banks in the Atlanta metropolitan area by The Citizens and Southern National Bank ("C&S"),[1] as a violation of section 7 of the Clayton Act, and (2) the present relationship between C&S and the five small banks (plus another small bank not involved in the proposed acquisition), as a violation of section 1 of the Sherman Act. After complete discovery and a full trial, the district court entered judgment for the defendants. The Department has appealed to this Court under the Expediting Act.

Background to the Department's Suit

Prior to 1927, Georgia law permitted banks to establish branch offices anywhere in the state, and C&S, whose home office was (and is) located in Savannah, Georgia, had established three offices in Atlanta (J.S. App. 9a). A law passed that year, as

[1] Technically, the proposal was for an acquisition of the assets and an assumption of the liabilities of the five banks, and the acquisition was to be made not by the C&S National Bank but by two subsidiaries (C&S East Point and C&S Emory) of a subsidiary of C&S National Bank (C&S Holding Company). Nothing in this case turns on these technicalities, so we shall ignore them.

The five banks to be acquired are C&S Sandy Springs, C&S Chamblee, C&S Park National, C&S North Fulton and C&S South DeKalb.

modified in 1929, forbade any bank to establish a branch outside of the city in which the bank's home office was located (J.S. App. 8a), although previously established branches could be retained.

This type of law—which treats branching by the opening of new offices (*de novo* branching) just like the acquisition of existing bank offices and which forbids branching regardless of the needs or competitive situation of the affected market—has been widely criticized as protectionist[2] and anticompetitive, notably by the Antitrust Division of the Justice Department.[3] It is also discriminatory: by freezing C&S at three offices in Atlanta, while allowing its competitors whose home offices are in Atlanta to branch freely throughout the city, the 1929 law placed C&S at a serious competitive disadvantage. Initially, however, C&S was able to use a method of internal expansion not dealt with by the 1929 law: the formation of a bank holding company followed by the organization of a new bank as a wholly owned subsidiary of the holding company (J.S. App. 9a-10a). Eventually, the state eliminated this method of internal expansion too: a statute passed in 1956 forbade a bank holding company to own more than 15 percent of the stock of another bank, and in 1960 the law was amended to reduce the maximum amount of stock ownership to five percent (J.S. App. 8a).[4]

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[2] The plain purpose of the 1929 Act was to protect the banks that were headquartered in a city from the competition of banks headquartered in other cities. Judging from C&S's growth (discussed in the text below) notwithstanding the 1929 Act and successor statutes, the effect of the Act, at least in Atlanta, was indeed to protect local banks against a more efficient competitor.

[3] See, with specific reference to Georgia's branch-banking law, App. E-836, and App. 294-95 (testimony of the government's expert economic witness). These criticisms of restrictive branch-banking laws were noted sympathetically in this Court's recent opinion in *United States v. Marine Bancorporation*, 418 U.S. 602, —, n. 8 (1974).

[4] As under the 1929 Act, existing relationships were grandfathered.

By this time, however, the establishment of additional branches within the city limits of Atlanta had ceased to be of pressing concern to C&S. The general movement of population, both residential and commercial, from Atlanta to its suburbs (App. 877) was creating a more acute problem for C&S than its lack of adequate branch offices within the city limits of Atlanta (see App. 345-47, 355, 853-55). C&S could not hope to retain the business of its customers who were moving outside of the city limits unless it established branches there, because these customers were unwilling to drive into the city to conduct their banking business (App. 347, 796).[5] Yet the combined effect of the 1929, 1956, and 1960 laws, it seemed, was to foreclose C&S from branching either directly or indirectly beyond the city limits of Atlanta.[6] This limitation affected all Atlanta banks, but C&S most acutely because its business success has been built largely on emphasizing the retail side of the banking business—*i.e.*, serving the needs of individuals and small firms (App. 351, 600, 863). The retail segment of the business is the most localized. The retail customer can be served effectively only by an office convenient to him.

It is a remarkable fact, and compelling testimony to C&S's competitive attitude and energies, that despite the very unequal impact of restrictive branch-banking laws on C&S compared to its major competitors, C&S became the largest bank in the City of Atlanta. Indeed, though C&S's home office is in Savannah and it has offices elsewhere in the state as well, today most of

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[5] Although many suburban residents commuted to downtown Atlanta and continued to patronize downtown banks, their families needed a suburban banking office. Moreover, businesses have increasingly been relocating in the suburbs, thereby eliminating commutation to the central city (App. 796).

[6] Although the state's branch-banking law had been changed in 1960 to permit branching throughout any city in which a bank had an office (J.S. App. 8a) this change of law did not enable C&S to establish branches outside of the city limits of Atlanta.

its business is in Atlanta. And its growth in Atlanta has been almost entirely a result of internal expansion rather than acquisition. Only about 12 percent of C&S's total demand deposits in the Atlanta area are accounted for by branches that it acquired rather than created *de novo*; only five of its 49 offices in the Atlanta area were acquired, and they were acquired over a period of time from 1929 to 1970.[7] All of C&S's acquisitions, moreover, have been of banks that were experiencing serious business difficulties (App. 344, E-476-78).

But the movement of people and business to the suburbs beyond the city limits of Atlanta could not be ignored. Beginning in 1959 C&S developed a method of expanding into the suburbs without (it believed) violating the state's branch-banking laws. This method—the "correspondent associate" system—is the basis of the Sherman Act charge in this case, and the background to the challenged acquisitions.

The Correspondent-Associate Program

The method used by C&S to enter the suburban Atlanta banking markets within the constraints imposed by state law involved the organization of new banks that would enjoy from the outset the special status of "correspondent associates" of C&S and the use of the C&S name and goodwill.

C&S was intimately involved in all aspects of the organization of the five banks that it is seeking to acquire formally (J.S. App. 42a: App. 461-62, E-590-92, E-604, E-644-45, E-653-56, E-677).[8] C&S prepared and filed the charter ap-

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[7] These computations are based on the evidence contained in GX 78 and GX 4 and exclude the pre-1927 acquisitions by which C&S first obtained a toehold in the Atlanta market.

[8] In one instance relevant to this case, C&S made an existing bank a correspondent associate. This bank, the C&S Bank of Tucker, is not involved in the Clayton Act phase of the case because the Federal Deposit Insurance Corporation denied C&S's application to acquire it (App. E-7-9), but its relationship with C&S is challenged as a violation of section 1 of the Sherman Act.

plications (J.S. App. 49a; App. 395, E-330, E-705) and placed the stock of the new banks with officers and employees of C&S, members of their families, and loyal customers of C&S (J.S. App. 43a-44a; App. 680, E-574-88), retaining for itself five percent of the stock of each bank (hence the term "five percent bank").[9] This was the maximum amount that state law permitted C&S to own directly (J.S. App. 43a-45a).

An especially important aspect of C&S's organizational role was its assurances to the chartering agencies that C&S was backing each new bank with its own financial resources and banking experience and would assist the new bank to become and remain a healthy and effective competitor. This commitment was frequently a controlling factor in the agency's decision to issue the charter (App. 349, 527, 576, E-331-36).[10]

To implement its commitment to the banking authorities (and to the local businessmen who had supported efforts to get the banks started), C&S undertook to furnish the principal executives of the banks from C&S's own executive ranks (J.S. App. 46a; App. 794-98, 813-15). These executives retained their C&S employment benefits while serving with a correspondent associate; indeed, for pension and promotion purposes, service with one of the correspondent associates was considered the same thing as working for C&S (J.S. App. 51a; App. 686-87, E-553-2 to E-555-2). C&S furnished assistance to the correspondent associates in many other forms as well. It

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[9] In some instances not involved in this case C&S obtained a five percent interest in a bank for investment purposes only, without making the bank a correspondent associate of C&S (App. 578-79). All subsequent references to "five percent banks" are to C&S's correspondent associates.

[10] In two instances, the bank regulators had refused to charter banks in areas where C&S then organized a correspondent associate (for which it obtained a charter) because the initial applicants had lacked adequate financial backing or banking experience (App. 740-41, 762-63, 850).

saw to the selection of qualified directors (J.S. App. 42a; App. 362-64, 427, 502, E-330). It selected the locations for the banks' offices (J.S. App. 49a; App. E-305-329, E-703-04). An executive of C&S was designated as an "advisory director" to meet with and counsel the board of directors of each bank (J.S. App. 53a; App. 811-12, 851). C&S furnished capital and managerial assistance to any correspondent associate that had special problems (J.S. App. 53a; App. 348-49, E-567-2, 568-2),[11] and to prevent problems from developing in the first place it not only conducted "surprise" audits of the banks (App. 169-70) but participated in credit checks of the banks' loans after they had been made, to assure that the banks' loan officers were not making unduly risky loans (App. 487-88, 728).

Further, C&S provided each bank with comprehensive and continuing advice, counsel, and information on all phases of the banking business. Much of this information was embodied in detailed operating manuals (J.S. App. 52a-53a; App. 503).[12] Some was contained in memoranda that the C&S head office in Atlanta circulated both to its formal branches and to the correspondent associates. It was bank policy to place the legend "FOR INFORMATION ONLY" clearly and conspicuously on all copies of memoranda that were distributed to the correspondent associates, including the few memoranda that related to prices or other terms and conditions of doing business (App. 754, 829-30). Occasionally, this legend was inadvertently omitted, but the five percent banks clearly un-

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[11] The record shows that C&S provided a substantial percentage of the capital for each correspondent associate through the purchase of common stock and capital notes and debentures. The percentage of total capital provided by C&S ranged from 33.7 percent for Chamblee to 41 percent for Tucker (App. E-691).

[12] As an example of the kind of valuable information furnished by C&S to the correspondent associates in the manuals, see App. E-692 (foreclosure of second mortgages on real estate) and App. E-693-98 (summary of Regulation Z of Federal Reserve Board); App. E-878-80 (audit procedures for certain kinds of loans); and App. E-1100-10 (summary of bankruptcy procedures).

derstood that such memoranda were intended for their information in making their own decisions (App. 776-77, 806-09, 829-30).

A very important element of the correspondent-associate relationship was the use by each correspondent associate of the C&S name and distinctive (bright-green lollipop-shaped) logogram (J.S. App. 50a; App. 774-75, 811, E-1804-15). The effect of the common name and logogram was that the average banking customer assumed that the correspondent associates were formal branch offices of C&S (J.S. App. 54a; App. 577-78, 617). Indeed, C&S and the correspondent associates are physically indistinguishable. (See pp. A-1, A-2, *infra*, photographs from the record of a formal C&S branch and a correspondent associate.)

Although C&S had reason to believe that the Justice Department interpreted the Sherman Act as authorizing C&S to determine the prices of the five percent banks,[13] it instructed its personnel, out of an abundance of caution and complete respect for the antitrust laws, never to attempt to direct or agree upon the prices or terms and conditions on which the five percent banks conducted their business (App. E-243-50, E-699-702A).[14] The C&S policy forbade agreements with or between the five percent banks on prices or customer or territorial allocation—all in an effort to carve out of the correspondent-associate relationship activities that might be

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[13] App. E-1830-35; see pp. 51-53, *infra*.

[14] Prior to 1962, some banks were unaware of the need to comply with the antitrust laws. They were first awakened to this need when Comptroller of the Currency James Saxon, on February 28, 1962, published his famous "clearing house letter" warning banks to avoid antitrust violations. See 79 Banking Law Journal 530 (1962). Although the applicability of this warning to the correspondent associate relationship was uncertain, C&S and the five percent banks placed restrictions on the relationship explicitly designed to avoid even an appearance of violation of the antitrust laws (App. E-243-50, E-699-702A).

regarded as violations of the Sherman Act (*ibid.*). This policy was scrupulously obeyed, and it was clearly understood by all concerned that the five percent banks had complete freedom and responsibility to adopt whatever prices, credit conditions, business hours, etc., that they thought best (*e.g.*, App. 478-79, 507-14, 731-32). The officers and directors of the five percent banks exercised this freedom and responsibility in light of the competitive conditions in their markets and their own unilateral business judgment (App. 690-91, 820-22). However, as a natural consequence of the C&S background and training of the five percent banks' executives, C&S's superior knowledge and experience with respect to competitive conditions in the banking industry, and the common name, logogram, and business methods, which identified the five percent banks in the public mind as branches of C&S, the five percent banks chose to compete *as* C&S banks rather than *with* C&S (*e.g.*, App. 480-81, 758). That is, they viewed themselves as offering a common service in competition with the services offered by non-C&S banks (App. 480-81).[15]

The extensive network of relationships between C&S and its correspondent associates went beyond the ordinary relationship between a bank and its correspondents (App. 89-95, 118-23, 143, 145-47).[16] The effect was to bring C&S banking

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[15] It must be remembered that the five percent banks were offering C&S services in geographical market areas in which C&S National and its majority affiliates were prohibited by law from operating.

[16] A large bank offering correspondent banking services does not routinely and systematically offer its correspondents a number of the services provided by C&S to the five percent banks, including the use of its name, goodwill, and personnel, the review and evaluation of management performance and credit reports, analyses of earning and expense ratios and other indices of effective performance, the use of general operating and credit guidelines and manuals, participation in pension and profit-sharing and other incentive plans, access to an emergency personnel pool, periodic and surprise continu-

methods to areas in which C&S was forbidden to have formal branches, and was therefore procompetitive (J.S. App. 28a).

The correspondent-associate program was at all times fully disclosed to, and understood and approved by, the state and federal banking agencies having regulatory authority over the banks (J.S. App. 46a-49a; App. 577, E-331-36). There was no concealment—quite the contrary, the relationship was viewed as a favorable, and frequently as a controlling, factor in the decision whether to issue a bank charter (*ibid.*).

In 1968 the Federal Reserve Board conducted an investigation (App. E-166-231) to determine whether C&S directly or indirectly controlled more than five percent of the stock of the five percent banks, which under the Bank Holding Company Act of 1956 would have required the Board's approval.[17] A hearing was held in which a representative of the Antitrust Division participated (App. E-217-18). The Board found no evidence of a violation of the Bank Holding Company Act and neither the Board nor the Antitrust Division suggested that the relationship between C&S and the five percent banks raised any question under the Sherman Act (App. 437-38, E-206-16, E-232-39).

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ing internal audits of operating procedures, preparation and analysis of budget and performance projections or goals, memoranda regarding changes in the laws affecting banking, an opportunity to attend training programs, etc. (compare App. 89-95, 118-23, 143, 145-47 with J.S. App. 46a-56a).

[17] In 1970, the statutory test of indirect control was expanded to embrace the exercise of a "controlling influence over management and policies." Existing relationships were grandfathered. See Bank Holding Company Act of 1956, as amended, §§ 2(d), 3(a), 11(d), pp. 3-5, *supra*.

The Proposed Acquisitions and the Proceedings Before the FDIC

The purpose of creating the correspondent associates was to give C&S the closest thing to branch offices that state law would permit it to have in the Atlanta suburbs. The system was viewed by all concerned as a distinctly second-best alternative to outright branching. Hence from the outset it was anticipated both by C&S and by an overwhelming majority of the other shareholders of each of the correspondent associates that if and when the limitations of Georgia law on branch banking were relaxed (or alternatively the city limits of Atlanta were expanded to include the suburban areas in which the five percent banks were located) the banks would be formally acquired by C&S (J.S. App. 45a-46a; App. 352-53, 424).[18] When on March 28, 1970, Georgia law finally was changed (effective January 1, 1971) to permit banks to branch throughout the counties in which they had offices, C&S applied to the Federal Deposit Insurance Corporation for permission to acquire the five sponsored banks plus a sixth correspondent associate (C&S Bank of Tucker) which it had not organized.

As required by the Bank Merger Act, the Department of Justice submitted to the FDIC a report on the competitive effects of the proposed acquisition (App. E-24-37). The Department's report advised that the proposed acquisition of the five sponsored banks would have "no adverse effect on competition" (App. E-26), since "no competition has ever existed between these banks" (*ibid.*). Indeed, the Department advised that "[t]hese mergers constitute what is essentially an internal reorganization" (App. E-25). The Department had taken the same

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[18] A 1971 survey of the stockholders of the correspondent associates showed that the overwhelming majority of them expressly anticipated that C&S would provide management for their bank and that their bank would be merged into C&S as soon as possible (J.S. App. 45a-46a).

position with respect to an earlier acquisition by C&S of a five percent bank (App. 431-32, E-1830-35); the Department had described the formation of the five percent banks as a form of *de novo* branching (App. E-1832).

The Department advised against approval of the proposed acquisition of C&S Bank of Tucker, however, emphasizing that it had been in existence for 50 years prior to its "affiliation" (the Department's term; see App. E-32) with C&S. It distinguished the proposed acquisition of the five sponsored banks in the following words:

> "There seems to be no question that these banks have always been 'affiliated' with the C&S system and have never represented independent competitors in DeKalb County banking. Thus, these mergers, standing alone, would have little or no effect on competition." [App. E-34.]

In none of the competitive reports was it alleged that the relationships between C&S and the five percent banks might violate the Sherman Act.[19]

Several months later, the Department withdrew its competitive report with respect to the proposed acquisition of the five sponsored banks and submitted a revised report based on a further investigation that it had conducted in Atlanta (App. E-38-56). The investigation had revealed that another bank that had once been a correspondent associate of C&S—Stone Mountain—had later severed its relationship with C&S. The episode persuaded the Department that the relationships between C&S and the sponsored banks were less permanent than it had previously thought. Again the Department did not allege that these relationships violated the Sherman Act.

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[19] Had the Department thought there was a Sherman Act problem, that would—by the government's present theory—have supplied a compelling reason for advising the FDIC not to approve the application.

The FDIC, after a detailed and thorough consideration of the matter, approved the acquisition by C&S of the five sponsored banks (App. E-1-6), but disapproved the proposed acquisition of Tucker (App. E-7-9). It found that C&S and the sponsored banks did not compete with one another and never had and that the possibility that the ties between them would dissolve was too remote to warrant a finding that the merger would eliminate a substantial potential for competition between them in the future:[20]

> "The banks involved in the proposed mergers do not compete today and never have competed in the past. The two smaller banks were both organized under C&S guidance and direction at a time when Georgia law did not permit C&S National or any other Atlanta bank to branch outside the City of Atlanta. A close working relationship has existed ever since and a majority of the stock in each bank has been held continuously by directors, officers and employees of C&S National, directors, officers and employees of subsidiary banks of C&S Holding, and a number of influential customers who maintain significant banking relationships with one or more such banks. The remaining stock is well dispersed, with no significant blocs held independently of the C&S system. From the inception of both banks, their management has been drawn from the C&S system, C&S National has hired all their employees, and these employees participate fully in the various employee benefits provided by the C&S system. Customers seeking services not provided by Sandy Springs Bank or North Fulton Bank are referred to C&S National, and that bank provides credit services, investment advice and numerous other services

[20] The quotations that follow are from the FDIC's report with respect to acquisition of two of the five sponsored banks (App. E-1-4). The findings and conclusions in that report were incorporated by reference in the FDIC's report on the acquisition of the other three sponsored banks (App. E-5-6).

for the two smaller banks in much the same manner as it does for its own branches or subsidiary banks. Like the other banks in the C&S system, these 5 percent banks use the C&S name and logo and advertise jointly. More than 40 percent of their respective loan portfolios are loans purchased from C&S National, while their buildings have been leased from other C&S entities. When additional capital became desirable, C&S National subscribed to capital notes of each bank. In short, North Fulton Bank and Sandy Springs Bank have been recognized by the public and the C&S National as part of the C&S system since their inception.

". . .[T]he Corporation finds no reasonable probability that North Fulton Bank or Sandy Springs Bank would become disassociated from the C&S system in the future if the proposed mergers are denied. This conclusion is based in part on the close working relationship described above and the continuing nature of that relationship throughout the history of both banks. The following considerations also appear relevant.

"The relationship between each bank and the C&S system has been mutually advantageous; voluntary disaffiliation would run the risk of significant transfers of banking relationships and official staff, and a consequent weakening of the ability of both banks to compete in the new and intensely competitive climate of county-wide branching.

"Neither bank has had significant transfers of stock since they were organized, and there is some evidence that persons who bought shares initially expected a merger into C&S National or a C&S majority-owned subsidiary whenever Georgia law was changed to permit it. The virtually unanimous vote of the shareholders of both banks approving the proposed merger into East Point Bank tends to

confirm this expectation and attests to the complete acceptance of C&S direction by shareholders as well as directors of the two banks." [App. E-2-3.]

The voluntary disaffiliation of C&S Stone Mountain was distinguished:

"In the one recent example of voluntary disaffiliation by a five percent bank from the C&S system—out of more than 30 possibilities Statewide—that bank had a very significant bloc of stock held independently of C&S influence and a history of local independence on the part of its Board of Directors and top management. Its disaffiliation does not increase the likelihood of disaffiliation of North Fulton Bank or Sandy Springs Bank if the present mergers are denied.

"If voluntary disaffiliation represents no more than an unlikely possibility, the Corporation finds itself unable to conclude that the proposed mergers would eliminate any significant potential for increased competition between the two banks or between either of them and the rest of the C&S system banks.

"The Corporation concludes that the proposed mergers would not be anticompetitive either as to existing or as to potential competition." [App. E-3].

However, the FDIC disapproved C&S's proposed acquisition of Tucker on the ground that the establishment of the correspondent associate relationship—which the FDIC treated as a *de facto* acquisition of C&S Tucker—had been anticompetitive when made in 1965, in view of Tucker's substantial position in the market at that time (App. E-7-9).

The Proceeding in the District Court

Following the FDIC approval, the Department of Justice brought suit challenging the proposed acquisition of the five sponsored banks by C&S as a violation of section 7 of the Clayton Act. For the first time, the Department suggested that the relationships between C&S and the five banks (plus Tucker) that comprised the correspondent-associate system violated the Sherman Act. Specifically, the complaint (App. 17-20) alleged that the "close working relationship" between C&S and the five percent banks noted by the FDIC in its report approving the proposed acquisition was a conspiracy to eliminate competition, in violation of section 1 of the Act.

Pursuant to the Bank Merger Act, the acquisition of the five sponsored banks by C&S was automatically stayed upon the filing of the government's suit. The stay remains in effect.

At trial, the government introduced two sorts of evidence in its attempt to demonstrate a violation of section 7 of the Clayton Act. The first related to the government's claim that the Atlanta area, and certain counties or parts of counties within the area, were appropriate geographical markets in which to appraise the competitive effects of the proposed acquisitions. The second consisted of statistics showing the percentages of loans and deposits accounted for by the parties to the proposed acquisitions in the various alleged markets. The statistics showed that C&S had about 30 percent of total deposits, and the five sponsored banks together about two percent, in the Atlanta area (J.S. App. 39a). In the other markets proposed by the government, C&S's percentage was somewhat lower and the sponsored banks' somewhat higher (J.S. App. 31a-38a).

No attempt was made to prove that C&S and the sponsored banks had been in the same geographical market at the time

that the sponsored banks were originally formed. The government conceded that, treating their formation as the equivalent of their having been acquired by C&S (the approach taken by the FDIC), the acquisitions could not have raised any question under section 7 of the Clayton Act (J.S. App. 64a-65a).

With respect to the Sherman Act, the government offered no evidence except communications between C&S and the five percent banks—in particular communications with respect to rates and hours of business of C&S. The government's apparent theory of the section 1 violation at trial was that the communication of any information and advice with respect to the terms and conditions of the sale of banking services constituted a *per se* violation of section 1 as the government interpreted *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

In its opinion finding for the defendants, the district court dealt first with the Sherman Act charge. It did not reach the defendants' arguments that the relationships among them were protected from antitrust attack by the subsidiary exemption of section 7 of the Clayton Act and by the grandfather provisions of the Bank Holding Company Act. The court held, in the alternative, that the government had failed to prove an agreement in unreasonable restraint of trade and that the question was in any event within the exclusive primary jurisdiction of the Federal Reserve Board, since it related to the organization and operation of a bank by a bank holding company.

The court first observed:

> "Generally, only unreasonable restraints of trade violate Section 1 of the Sherman Act. Some practices, such as agreements not to compete, collusive price fixing, agreements for market division, group boycotts, tie-in agreements (perhaps), and pooling of profits and losses, however, have been found to be so intrinsically unreasonable as to

> constitute what have come to be called per se restraints or violations of the Act." [J.S. App. 20a-21a.]

But all the government had alleged was:

> "1. The routine and systematic practice of furnishing to one another comprehensive information as to past, present and future competitive practices and policies with a purpose of achieving uniformity among the defendants;
>
> "2. The provision by C&S National to the five percent defendants of various manuals and memoranda;
>
> "3. The provision by C&S National to the five percent defendants of suggestions and advice on such matters as rates, hours of operation, types of loan to discourage and minimum loan rates. [Plaintiff's post-trial brief, pp. 57-64]." [J.S. App. 24a.]

After observing that the advice and suggestions had generally been followed, the court then found that the defendants' behavior did not constitute a *per se* violation:

> "These activities, however, do not amount to collusive price fixing. For example, there is no suggestion that any advice as to rates amounts to more than an expert appraisal of a market situation from the point of view of a lending institution—a type of opinion to which a lending institution would naturally be expected to pay great attention. Likewise, the Court does not view the pleadings or evidence as suggesting the existence of any agreements not to compete or for market division." [J.S. App. 24a.]
>
> . . . .
>
> "The practices involved here do not conform to the accepted definition or description of *per se* antitrust violations where no resort to context or circumstances is required (or permitted)." [J.S. App. 25a.]

Having found that there was no *per se* violation, the court then addressed the question whether the alleged information exchanges might violate the Rule of Reason, and held that

> "The Government has not sustained its burden of proof as to the unreasonableness of the practices involved or with respect to any adverse impact upon competition. There was no evidence that any customers or potential customers were being adversely affected, and the heads of each competitor organization testified that the operation of the five percent defendant banks as 100 percent C&S banks would not adversely affect them or change the competitive impact on them in any way. There is no evidence that the quality of service would have been improved absent the factors of which the Government complains. The Government has relied upon a claimed *per se* illegality rather than unreasonableness of the specific practices involved and, for the reasons set forth above, the Court does not believe the evidence will support a finding that such practices in fact were unreasonable restraints of trade. Indeed, the Court is constrained to find that, balancing the evidence, such practices were in fact reasonable." [J.S. App. 27a-28a.]

Summarizing, the court stated:

> "There is no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources. In either case there is the flow of information as to rates, practices, etc., which the Government apparently applauds or at least condones in a correspondent banking relationship. Taking this into consideration, as well as the Government's previously-quoted statement in *Marine Bancorporation,*

> *supra,*[21] the Court finds as a fact that the relationship between C&S National, C&S Holding, and the five percent defendant banks, and the interchange of information between them, have been reasonable under the circumstances and not in violation of Section 1 of the Sherman Act. The Court also finds that the Government has not sustained its burden of proof to the contrary." [J.S. App. 29a.]

Having disposed of the section 1 charge, the court turned next to the section 7 charge. It did not reach the defendants' arguments that the government had defined the geographical markets incorrectly and that the acquisition was protected by the convenience and needs defense of the Bank Merger Act. The court held that the government had failed to prove that the proposed acquisitions were likely to lessen competition substantially, in light of the existing relationships between C&S and the five percent banks that it proposed to acquire.

After a lengthy review of those relationships (J.S. App. 42a-55a), and a discussion of *United States v. Trans Texas Bancorporation,* 412 U.S. 946 (1973), *affirming per curiam* 1972 Trade Cases ¶ 74,257 (W.D. Tex.), where this Court had affirmed the dismissal of a complaint challenging a merger between related banks—a decision "almost squarely in point" (J.S. App. 60a)—the district court stated:

> "The Government admits that it did not challenge the initial acquisition by C&S Holding of its five percent in-

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[21] The court here was referring to the government's jurisdictional statement in *United States v. Marine Bancorporation,* 418 U.S. 602 (1974), where the government had applauded the method used by C&S to gain entry into the Atlanta suburbs in the following words, quoted by the district court in the present case at J.S. App. 22a-23a (emphasis the court's):

> "*Banks in the State of Washington have, however, achieved de novo entry into areas foreclosed to de novo branching by sponsoring the organization of an affiliate bank, and later acquiring the bank. This method of expansion is a legal (Tr. 732-733) and a well-recognized practice used by large statewide banking organizations (GX I, Tr. 280, 298) and recognized by the federal banking authorities (GX H).*"

> terest in each of the five percent defendant banks because those acquisitions 'were competitively insignificant when made.' [Plaintiff's post-trial brief, p. 14] The Government has not carried its burden of demonstrating any substantial increase in the degree of control or change in quantity of competition between the date of the initial acquisitions and the date of the trial. The Government has postulated that if the mergers are denied, C&S may establish *de novo* branches in direct competition with the five percent defendants. To find a viable competitive result from such a postulate, the Court would have to speculate that (1) the five percent defendant banks actually would break away from C&S, (2) they would become successful independent banks despite their past reliance on C&S, and (3) the regulatory agencies would approve directly competitive branching by C&S. The evidence of record does not support, individually or collectively, such postulates or speculations." [J.S. App. 64a-65a.]

In summary, the court found that since the five percent banks did not compete with each other or with C&S (except for the sort of "friendly rivalry" often carried on within an organization [J.S. App. 64a; App 480-81, 705-07]), and were unlikely ever to do so, the proposed acquisition would be (as the Justice Department had initially advised the FDIC) in the nature of an internal reorganization, and would not affect the competitive situation in the Atlanta banking markets.[22]

The IBA Suit and the District Court's Amended Order

Simultaneously with this antitrust action, a suit brought by a trade association of C&S's competitors, the Independent Bank-

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22 The court observed that the government had not produced a single witness to testify that the proposed acquisition would adversely affect competition. Even the government's expert economic witness failed to testify on the competitive implications of the acquisitions. (J.S. App. 55a-56a.) The government's case thus rested entirely on concentration statistics.

ers Association of Georgia, challenging the relationship between C&S and the five percent banks as a violation of Georgia's bank holding company law, was wending its way through the Georgia courts. Shortly after the district court rendered its decision in the antitrust suit, the state-court litigation was finally terminated by the issuance of a decree by the Commissioner of Banking and Finance for the State of Georgia pursuant to a mandamus issued by the Supreme Court of Georgia in *Independent Bankers Ass'n v. Dunn*, 230 Ga. 345, 197 S.E. 2d 129 (1973), modified *sub nom. Citizens & Southern Nat'l Bank v. Independent Bankers Ass'n*, 231 Ga. 421, 202 S.E. 2d 78 (1973). That decree (J.S. App. 75a-87a) required the divestiture of certain stock in the five percent banks owned by some officers of C&S and certain other nominal changes in the correspondent-associate system (see pp. 69-70 *infra*). On a motion by the defendants in the antitrust suit—to which the Department of Justice made no objection—the district court entered an order *nunc pro tunc* amending its opinion to state that the changes in the five percent system required by the Commissioner's order did not alter the court's conclusion that the proposed acquisitions would not substantially lessen competition (J.S. App. 70a-72a).

SUMMARY OF ARGUMENT

During the 1960s The Citizens and Southern National Bank, a major bank in Atlanta, was barred from opening branch offices in metropolitan Atlanta beyond its tight city limits by a Georgia law that the Justice Department has denounced as anticompetitive. C&S developed, however, a method of expanding into the suburbs notwithstanding the provisions of the state law. The method, which was fully understood and sanctioned by the federal and state bank regulators, involved organizing new banks in the suburbs, taking back a five percent stock interest (the maximum that C&S was permitted by the state bank-holding-

company law to own directly), placing the remaining stock with friends of C&S (officers, employees, loyal customers, etc.), staffing the banks, and furnishing them with voluminous advice, guidance, and information with respect to all phases of the banking business. The new banks were given the C&S name and permitted to use C&S's distinctive logogram; as a result the "five percent banks" became identified in the public mind as branches of C&S.

This system of indirect branching was regarded as a stopgap: it was anticipated that as soon as the restrictions against branching beyond Atlanta's city limits were relaxed, C&S would formally acquire its "correspondent associates" (the five percent banks). But when the restrictions were relaxed and C&S attempted to acquire the five percent banks in 1971, it was met by a double-barreled attack by the Justice Department, which charged that the proposed acquisitions violated section 7 of the Clayton Act and that the correspondent-associate relationship violated section 1 of the Sherman Act.

I

The position of the Justice Department in this case is anticompetitive. C&S used the only method open to it to expand internally into the Atlanta suburbs. The Justice Department generally regards internal expansion as procompetitive and laws that block it as anticompetitive, yet it asks this Court to place conditions on the use of indirect branching in this case that would make this form of internal expansion utterly unusable. Although the prospect of eventually being able to acquire the five percent banks was a critical inducement to C&S when it organized them, the Justice Department seeks to destroy that prospect by attacking the eventual acquisition as a violation of section 7 of the Clayton Act. Moreover, although the intimate relationship that existed from the outset

between C&S and the five percent banks was a decisive factor in the decision of the banking agencies to charter those banks, the Justice Department seeks to preclude the development of such a relationship by attacking it as a *per se* violation of the Sherman Act.

The Department's position in this case is not only inconsistent with the policy of the antitrust laws themselves, which is to foster internal growth, especially in markets impeded by regulatory barriers to entry, but it is also inconsistent with the position the Department urged in this Court less than a year ago in *United States v. Marine Bancorporation*, 418 U.S. 602 (1974). There the Department asked the Court to encourage banks to use just the method of internal growth that C&S used in this case—and that the Department has now unaccountably attacked.

Besides failing to interpret the antitrust laws consistently and purposively, the Department in this case has exalted form over substance. Were it not for the provisions of Georgia law that the Department deplores, the five percent banks would have been formal branches of C&S from the outset and no conceivable issue of antitrust illegality would have been raised by their failure to compete with C&S. Georgia law forced C&S to take an indirect route and defer obtaining formal corporate control of the five percent banks for a period of years. There is no basis for condemning a practice under the antitrust laws because it is unconventional—especially when it is procompetitive. The Justice Department's apparent concern that if C&S's conduct is sanctioned General Motors will somehow be able to acquire Ford without committing a violation of the antitrust laws suggests a remarkably gloomy assessment of the ability of courts to make distinctions—and, as to banking, completely ignores the statutory requirement since 1970 that relationships similar to those involved here must be

approved by the Federal Reserve Board, after notice, opportunity for hearing, and consideration of the views of the Department of Justice (12 U.S.C. §§ 1841(d), 1842 (a)(2)).

II

Quite apart from the perversity of its position in this case, the Justice Department has failed to present any basis in logic or precedent for reversing the district court's decision, which found for the defendants on all counts after a full trial. With respect to the alleged violation of section 1 of the Sherman Act, the Department has experimented in the course of this proceeding with a variety of theories, and all are untenable. Its brief on the merits advances three theories. One is that there was an actual price-fixing conspiracy between C&S and the five percent banks. This theory appeared for the first time in the Brief in Opposition to Motion to Affirm. It is foreclosed by a finding of fact of the district court that there was no agreement between C&S and the five percent banks not to compete. The only evidence the government points to in support of this theory is C&S's communication of some price information to the five percent banks followed in a few instances by changes in the prices charged by the latter banks. Such evidence is plainly insufficient to warrant (let alone compel) an inference of price fixing—else anytime a firm publicly announced a price change that a competitor followed it would be guilty of a crime. The government has ignored undisputed evidence that the price communications were purely informational, that they were not attempts either to dictate or to invite agreement upon prices, and that the five percent banks made their pricing decisions unilaterally.

Even if C&S had attempted to dictate the prices charged by the five percent banks, it would not be guilty of violating the Sherman Act. So extensive were the linkages between C&S and

the five percent banks that the Department accepts the description of the latter as "*de facto* branches" of C&S. Indeed, it describes C&S plus the five percent banks as constituting a "single economic enterprise." The control of pricing within a single economic enterprise does not violate the Sherman Act. To be sure, if subsidiaries or branches hold themselves out to the public as independent firms, the "intra-enterprise conspiracy doctrine" may require them to determine prices independently (as the five percent banks in fact did here). But since the five percent banks did *not* hold themselves out as being separate and independent from C&S (quite the contrary), the doctrine was not applicable. Indeed, the public position of the Department (conveniently suppressed in its brief in this case) is that the doctrine is inapplicable to the banking industry, unless predatory conduct is involved (it is not here).

The Department's second theory of Sherman Act violation is that the exchange of price information is a *per se* violation under the teachings of this Court's decision in *United States v. Container Corp. of America*, 393 U.S. 333 (1969). But that decision holds that an *agreement* to exchange price information is unlawful where the *circumstances* indicate that the exchange is likely to affect the competitive price level. Both elements are missing here. There was no exchange of information from which an agreement to exchange might have been inferred, as in *Container*; here the only significant information flow was in one direction—from C&S to the five percent banks. And whereas in *Container* the exchange of price information encompassed all of the leading sellers in a market that had structural characteristics which this Court found conducive to the use of information exchanges to stabilize prices, here the recipients of the information (the five percent banks) were not leading sellers whose decisions could affect the market price, and no evidence whatever was introduced to show that the market had such structural characteristics as might enable prices to be stabilized by an exchange of price information.

The Department's final theory of Sherman Act violation is that the totality of the relationships between C&S and the five percent banks was itself a *per se* violation. Apparently in the Department's view any agreement between competing firms which reduces the intensity of their competition is a *per se* violation of the Sherman Act. This is an absurd position, which would make all horizontal mergers, joint ventures and franchise arrangements *per se* violations of the Sherman Act. The elements of cooperation between C&S and the five percent banks that resulted in the latter banks' deciding to compete *as* parts of a C&S system rather than *with* C&S, in particular the decision to use C&S's name, distinctive logogram, and banking methods and services, are far removed from the sorts of practices that this Court has deemed *per se* violations. The distinction is illustrated by such decisions as *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); and *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). The cooperative-advertising agreements in the first two cases and the joint operating agreement in the third, though they may have reduced the vigor of competition between the parties, were not challenged as antitrust violations, let alone as *per se* violations; challenged were separate agreements between the parties not to compete, and there is no such separate agreement in this case.

The government staked its entire case on a *per se* approach. No evidence was introduced to show that the correspondent-associate system constituted in fact an unreasonable restraint of trade. Plainly, it was reasonable. It enabled C&S to expand into new markets and thereby increase the amount of competition there. Any restraint of competition between C&S and the five percent banks was trivial, since C&S and the five percent banks were in separate markets and since in any event the combined market share of C&S and the five percent banks was too small to confer power over price. And no less restrictive alternative was available. Had C&S not assisted and cooperated

with the five percent banks in the ways that it did, those banks would not have been chartered in the first place and the competitive benefits of C&S's expansion into the Atlanta suburbs would have been lost.

III

The district court held in the alternative that the Sherman Act issue in this case was within the original exclusive jurisdiction of the Federal Reserve Board. This Court's decision in *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), held that questions relating to the organization and operation of banks by a bank holding company must be tendered to the Board in the first instance. C&S is a registered bank holding company, and the alleged violation of the Sherman Act pertains to its activities in the organization and operation of the five percent banks. The essential elements of the alleged violation were considered in an investigation which the Board, with the participation of the Antitrust Division, conducted in 1967 and 1968. No impropriety was found, and the Division failed to challenge the Board's findings within the 30-day period prescribed by the Bank Holding Company Act. It is barred from challenging them for the first time in this suit.

IV

The government in this Court rests its section 7 case entirely on the defendants' alleged antecedent violations of Georgia law and of section 1 of the Sherman Act. This is a patently inadequate foundation. The issue of C&S's violation of Georgia law has been authoritatively resolved by the entry of an order by the Georgia Commissioner of Banking and Finance rectifying what the district court described as C&S's "technical" violations of Georgia law. The order does not mandate substantial changes in the correspondent-associate system, and its probable impact was in any event fully considered by the dis-

trict court which found as a fact that the order did not alter its finding that the five percent banks were unlikely ever to become independent competitive factors.

Even if a violation of section 1 of the Sherman Act had been proved in this case, it would not bar the merger. The section 7 issue is not whether the defendants violated the Sherman Act, but whether, if so, enjoining the violation will make the five percent banks independent competitive factors. The Department, however, introduced no evidence to show that the alleged Sherman Act violation was a substantial cause of the noncompetitive relationship between C&S and the five percent banks. The record shows, in fact, that the specific acts on which the section 1 charge rests, mainly C&S's price communications to the five percent banks, were an irrelevant factor in the noncompetitive relationship between the banks. The glue that holds the five percent banks to C&S is made up of the various components of the correspondent-associate relationship, such as the common name. That is why the government in this Court is forced to argue that the entire relationship between C&S and the five percent banks constitutes the *per se* violation of the Sherman Act—otherwise it cannot prevail under section 7.

Apart from the alleged antecedent violations, there is no basis whatever for the government's appeal on the section 7 phase of the case, as the government in this Court seems virtually to concede. Since it is agreed that the five percent banks do not compete with C&S and will not do so unless and until the correspondent-associate relationship is terminated, the formal acquisition of the five percent banks by C&S can lessen competition only if there is some basis for predicting that the relationship is in fact likely to be terminated in the foreseeable future. This presents a factual issue (analogous to the prediction of the future competitive potential of the acquired firm in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)), which the district court resolved in the defendants' favor. Since the government does not challenge the

finding as clearly erroneous, that is the end of the matter. In any event the court's finding was clearly correct. A voluntary severing of the correspondent-associate relationship by the five percent banks is extremely unlikely because it would deprive them of their principal assets—the C&S name and goodwill. Only once before has a correspondent associate withdrawn from the C&S system and that was in circumstances wholly different from those at bar. Nor will C&S expel the five percent banks. That would deprive it of branches in the Atlanta suburbs, and while C&S is no longer barred by state law from opening formal branches there, it is uncertain at best whether the banking agencies would permit it to do so in view of the precarious position in which the (former) five percent banks would be placed if, having lost their C&S affiliation, they were compelled to compete against C&S. At all events, C&S has no incentive to create new competitors for itself—the consequence if, after expelling the five percent banks, it opens new offices, in competition with them, in order to retain its foothold in the Atlanta suburbs.

V

There are additional grounds, not reached by the district court, for sustaining the judgment of the district court in favor of the appellees. First, three of the correspondent-associate relationships were created prior to June 1, 1966, and are therefore immunized from antitrust attack (other than under section 2 of the Sherman Act) by the broad grandfather provisions of the Bank Holding Company Act. Second, the creation by C&S of *de facto* subsidiaries was protected by the subsidiary exemption in section 7 of the Clayton Act. Third, the government failed utterly to establish a relevant geographical market in which to appraise the competitive effects of the challenged acquisitions, under the standards set forth by this Court last Term in *United States v. Connecticut National Bank*, 418 U.S. 656 (1974).

ARGUMENT

I. The Correspondent-Associate Program That the Justice Department Is Attacking in This Case Was a Necessary and Appropriate Method of Increasing Bank Competition.

We take it as axiomatic that the antitrust laws should not be interpreted in a fashion that defeats their purpose, which is to promote competition. But that is the interpretation that the Justice Department necessarily urges on this Court in attacking C&S's correspondent-associate program as a violation of section 1 of the Sherman Act and C&S's proposed acquisition of the correspondent associates as a violation of section 7 of the Clayton Act. We shall demonstrate that if the attack succeeds, the result will be that in the future banks that are subject to anticompetitive restrictions on branching similar to those that confronted C&S will not be able to overcome those restrictions and competition among banks will therefore be lessened.

The Justice Department has been a justifiably harsh critic of state laws that prevent banks from opening new branch offices regardless of the needs or competitive situation of the banking market involved (*e.g.*, App. E-836). It has specifically included Georgia's branch-banking laws in this condemnation (*ibid.*).[23] Logically, therefore, the Department should be encouraging rather than attacking the efforts of banks to overcome such restrictions, and in fact the Department's policy has been one of encouragement, except in the present case.

In *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), the Department argued for an interpretation of the antitrust laws under which a bank desiring to enter a new

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[23] Not a breath of such criticism appears in the government's brief in the present case. Evidently the Justice Department is more concerned with winning a case than with administering a consistent antitrust policy.

banking market in which it was forbidden by state law to open an office would be encouraged to sponsor a new bank, place the stock of that bank in friendly hands, and formally acquire the bank as soon as state law permitted.[24] The argument failed to carry the day for the Department, but for reasons unrelated to the merits of sponsoring and later acquiring a bank as a method of entering banking markets.[25] C&S has done just what the Justice Department proposed in *Marine*. Unable to enter the suburban Atlanta banking markets directly, it sponsored the formation of five small banks in those markets in the expectation of acquiring them if and when the state law preventing such acquisition was relaxed (or when the city limits of Atlanta were extended). When state law did change C&S tried to acquire the banks, only to encounter a double-barreled attack by the Justice Department: its relationship with the sponsored banks during the period between sponsorship and acquisition was claimed to violate the Sherman Act and the acquisition itself the Clayton Act.

The Justice Department complains[26] that its position in *Marine* has been misunderstood—that it did not say a bank was free to sponsor and later acquire a bank in the same market or that the sponsored bank could refrain from competition with the sponsoring bank. But that is precisely what it said. Under the Department's theory that an entire state is a relevant market in

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[24] See Brief for the U.S. in *Marine*, 16-17, 24, 45-52. An alternative also suggested by the Department in that case was the acquisition of a very small bank. State law eliminated that alternative in the present case.

[25] This Court held in *Marine* that the method suggested by the Department was unlikely to produce a substantial increase in competition in the market of the sponsored bank, since once it was acquired by the sponsoring bank it would be precluded, under Washington law, from establishing any new branch offices. There is no comparable state-law restriction in the present case.

[26] Although apparently with diminishing conviction. See Brief for the U.S. 39, n. 23.

which to appraise the competitive effects of a bank merger,[27] the sponsoring and sponsored banks in *Marine* would have been in the same market from the outset even though they were located in different cities. And the examples of how the sponsorship approach operates in practice that the Department cited to this Court in *Marine* explicitly assumed that the relationship between sponsoring and sponsored bank precluded competition between them: the Department described the sponsored bank as a "satellite" of the sponsoring bank.[28]

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[27] This theory was rejected by the Court in *Marine*. But whether sponsoring and sponsored banks located in different cities are regarded as being in the same relevant market is actually a detail, since the government has challenged many bank mergers on the theory (the principal theory, indeed, urged by the government in *Marine*) that they eliminate potential competition. The government has not abandoned this theory despite its loss of the *Marine* case. Thus a merger between a sponsoring and sponsored bank located in different cities would always be in antitrust jeopardy under the potential-competition doctrine, if the government's position in the present case were upheld. Such jeopardy would discourage use of the sponsorship method of entering bank markets, contrary to the urgings of the Department in *Marine*.

[28] See Brief for the U.S. in *Marine*, 16, n. 16. The Department specifically suggested that the sponsoring bank acquire 25 percent of the common stock of the sponsored bank (the maximum permitted by the applicable state law) and place the remaining stock with officers, directors, and associates of the sponsoring bank (*id.* 24, 16). Yet under the theory advanced by the Department in the present case, this procedure would constitute an illegal agreement to make the sponsored bank a "vassal" of the sponsoring bank (Brief for the U.S. in instant case, p. 42).

Here are some other examples—drawn from the portions of the *Marine* appendix which the government cited in illustration of how the sponsorship-followed-by-eventual-acquisition approach operated (Brief for the U.S. in *Marine* 16, n. 16; p. 45, n. 36)—of the relationship approved by the government between a sponsoring and a sponsored bank:

> "The . . . selling institution . . . was organized in 1965 under the guidance of the applicant bank. . . . Until two years ago, excessive loan loss was a serious problem, but with the applicant bank management virtually taking over all the affairs of the selling bank, this problem has now been solved. Decisions of consequence are presently made by the applicant

Not only is the Justice Department taking inconsistent positions before this Court in cases argued less than a year apart, but the conditions that it is now asking the Court to place on the use of the sponsorship method of entry are unrealistic and will cripple it, to the detriment of competition in the banking industry. The method is not practicable if the banks involved must speculate on whether—if and when a merger between them becomes permissible under the applicable state law—a court will decide that they are *at that time* in the same market. This is the relevant time in the government's view. It offered no evidence that when C&S sponsored the five percent banks the

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bank's management. The proposed acquisition will have little if any effect on competition between the two banks. . . . [T]he present ties that exist between the management of the purchasing and selling banks . . . [have] served to limit the effective competition between the two institutions. [App. 1294.] . . . Other Bank has been operated more like a branch of applicant than as an independent bank [App. 1297].

. . . .

"In 1964, during the organizational state, First received the assistance of Old National, which continues to serve as its principal correspondent and has provided a chief executive officer since about 60 days after that bank began operations. . . . Due to the distance separating the offices of the subject banks, the correspondent, managerial, and other relationships existing between them, there appears to be little competition which will be eliminated by this proposal. [App. 1306.]

. . . .

"Tri-Cities National Bank, a satellite of the purchasing bank, opened in 1961 to provide the purchasing bank with access to the Pasco area. . . . Due to the interlocking relationship between the purchasing and selling banks, consummation of the purchase and assumption would not have the effect of eliminating significant competition. [App. 1315-16.]"

The Department apparently has forgotten its competitive report to the Comptroller of the Currency in *Marine,* where after first noting that "NBC cannot establish *de novo* branch offices in the City of Spokane," the Department stated: "Nonetheless, NBC could enter Spokane in a manner competitively tantamount to *de novo* branching. Specifically, NBC could acquire the city's smallest bank, or through nominees it could assist in chartering a new bank in Spokane, with which it might subsequently merge." In the present case the Department refuses to treat C&S's use of this suggested method as "tantamount to *de novo* branching."

latter were in the former's market; and what evidence there is on the question is to the contrary.[29] Since the probability that the markets of sponsored and sponsoring banks will converge is of course greater the more rapidly the banks are growing, the government's approach is designed to discourage, by penalizing, competitive success achieved through offering better service or lower prices.

The sponsorship method of bank entry is also impracticable if, as the government now insists, the relationship between sponsored and sponsoring bank must be so structured as to assure that the two compete with each other as aggressively as they would if they were completely unrelated firms. The elements of cooperation that are fundamental to the sponsorship method—the initial backing of the sponsored bank with people and funds, a commitment to foster its competitive success, the placing of its stock in friendly hands to smooth the way for an eventual acquisition—are treated by the Justice Department as evidence of an illegal conspiracy to suppress competition between sponsoring and sponsored banks. Yet these elements of cooperation are essential to using the approach. Without C&S's commitment to the banking agencies to take responsibility for the management and policies of the five percent banks, the banks would not have obtained charters and so would not exist (J.S. 45a-49a; App.

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[29] We show below (in Part V(C)) that, under the standards for defining geographical markets set forth in last Term's *Connecticut National Bank* decision, the banks were not in the same market even at the time of trial. The banks were clearly in separate markets at the time of original sponsorship, when (1) transportation between Atlanta and its suburbs was not so good as it is today; (2) C&S had fewer branches in parts of the city adjacent to the suburban areas involved in this case; and (3) because branch banking laws forbade it, C&S had no branches beyond the city limits of Atlanta. Thus, when the five percent banks were organized, the Federal Reserve Board permitted officers of C&S to serve as directors of the five percent banks, despite the prohibition contained in section 8 of the Clayton Act, 15 U.S.C. § 19. The Board relied on the exception in section 8 that permits interlocking directorates when the banks are not located in the same town or in contiguous towns (App. 392, 450-51).

349, 527, 531-32, 576, E-331-36), but given such a commitment the banks were not likely to compete vigorously with C&S.

The artificiality of the Department's position emerges even more clearly when it is recalled that the method urged by the Department in *Marine* contemplates, from the outset, the eventual acquisition of the sponsored by the sponsoring bank.[30] Firms that intend to merge as soon as some artificial obstacle is removed are not likely to compete vigorously in the interim. Placing the stock of the sponsored bank in friendly hands (friendly to the sponsoring bank, that is) is another essential step in the plan of eventual acquisition—as C&S's experience with Stone Mountain attests[31]—but of course it greatly reduces the probability that the sponsored and sponsoring banks will compete. Thus the Department's position in this case, by precluding use of the very method of indirect branching proposed by the Department in *Marine*, will, if accepted, deter the internal expansion of banks in C&S's situation, contrary to the Department's own policy and to the purposes of the antitrust laws.

Besides not reading statutes purposively, the Justice Department in this case is guilty of the further sin of exalting form over substance. Were it not for the restrictions that Georgia law placed on *de novo* branching—restrictions that the Department rightly regards as anticompetitive and unjustified—the sponsored banks would have been formal branches of C&S from the outset; and no conceivable issue of antitrust illegality would have been raised by C&S's opening branch offices, albeit they would not have competed with each other or with C&S's other officies. Georgia law compelled C&S to adopt an indirect ap-

[30] As the record in this case shows, the prospect of eventual acquisition is an important inducement to both the sponsoring bank and the other organizers of and investors in the sponsored bank (App. E-590-91, E-617-18, E-644-45; see also note 18, *supra*).

[31] See p. 19, *supra*, and pp 73-74, *infra*.

proach, in which the vesting of formal ownership of the branch offices in C&S had to be deferred for a period of years. The result was a form of transaction that was, at worst, unconventional; it should not on that account be held to violate the antitrust laws.

The inescapable conclusion is that the Justice Department in this case is attacking internal expansion, although its usual and correct position is that internal expansion in the banking industry is procompetitive. The only conceivable reason for the Department's espousing a different position in this case is a desire for mechanically simple rules of antitrust law. The Department evidently distrusts its ability, and that of the banking agencies and the courts, to make even the grossest factual distinctions, for example between the situation in this case and one where two competing firms seek to thwart antitrust policy by first agreeing not to compete and then using that agreement as the basis for arguing that a merger between them will not affect competition. A sufficient distinction is the absence from the hypothetical case of the sorts of artificial restrictions on internal growth that compel banks situated like C&S to resort to unconventional methods of expansion and justify them in doing so.[32] Nor is there any basis for the Department's apparent fear

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[32] In its Brief in Opposition to the Motion to Affirm, and again in its brief on the merits (p. 61, n. 61), the Department cites five recent decisions of the Federal Reserve Board in support of the proposition that if the district court's decision in the present case is upheld, "other banks may be expected to seek shelter from the antitrust laws by expanding correspondent relationships into '*de facto* branches' and then justifying the acquisition of those 'branches' on that ground." (Brief in Opp. 5.) What the decisions in fact show is that the banking agencies have no need for the kind of rigid rule urged by the Department. In one of the cited cases, the Board denied approval of the acquisition (*First Int'l*). In another, the acquiring bank had majority stock control, and so the acquisition was permissible under the approach taken by the Department (see Brief for the U.S. 55, 57) (*First Int'l*). In the third case the Board denied one application and granted the other on the ground that the acquired bank was an insignificant competitive factor (*First City*). The other

(Brief for the U.S. 34-35) that if it does not prevail on the section 1 charge in this case, C&S will be free to arrange to operate its offices in Atlanta as *de facto* branches of its largest competitor. A *de facto* merger is of course subject to legal scrutiny under section 1 of the Sherman Act and section 7 of the Clayton Act. The government does not need mechanical and anticompetitive antitrust rules to prevent genuine abuses of the competitive process. This is particularly true now that the Bank Holding Company Act has been amended to require formal Federal Reserve Board proceedings before a subsidiary relationship based upon a controlling influence over management and policies of a bank may be established, and these proceedings include formal notice to the Department of Justice and an opportunity for it to participate in the proceedings (12 U.S.C. §§ 1841(d), 1842(a)(2)).

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two cases, like the present case, involved attempts to acquire banks that the acquiring bank had originally sponsored as a method of expanding in the face of state home-office-protection laws. None of the five cases involves an attempt to evade the antitrust laws by "expanding" ordinary correspondent relationships into correspondent-associate relationships, or supports the Department's claim that affirming the district court's decision in this case would be an invitation to abuses. We point out that in the single instance of an attempt to acquire a correspondent associate that had not been sponsored by C&S (C&S Bank of Tucker), the FDIC turned down the acquisition. There is thus no evidence that either the banking agencies or the courts are incapable of handling the problem soundly on a case-by-case basis. See also the reasoned defense of that approach by the Federal Reserve Board in *Trust Co. of Georgia*, 57 Fed. Res. Bull. 517 (1971).

II. The Correspondent-Associate Program Has Not Been Shown to Restrain Trade Unreasonably, in Violation of Section 1 of the Sherman Act.

A. Introduction

1. The government has no theory as to how the appellees might have violated section 1.

The government has never made up its mind what conduct of C&S and the correspondent associates it considers to be in violation of section 1 of the Sherman Act. Perhaps this is because, until the case reached this Court, the role of the section 1 charge in the government's overall strategy was as a tactical adjunct to the section 7 charge.

The Justice Department had known of the correspondent-associate relationship since at least 1968 (App. E-217-18) yet had raised no question about it until it filed this suit. Even in its reports to the FDIC concerning the competitive effects of the proposed acquisition by C&S of the correspondent associates (App. E-24-37) the Department did not allege a section 1 violation, although such a violation would have constituted (under the Department's present thinking) a compelling reason for the FDIC to disapprove the acquisition. The section 1 charge first appeared in the complaint, but, as alleged, was clearly insufficient as a matter of law: the charge (since abandoned) was that the defendants had committed a *per se* violation of section 1 by maintaining "a close working relationship" (App. 17-20). The obvious purpose of including a section 1 charge was to impale the defendants on the horns of a dilemma: either the defendants were in competition, and therefore the proposed acquisition would eliminate substantial competition in violation of section 7 of the Clayton Act, or they were not competing, in which event they must be violating section 1 of the Sherman Act.

But the government overlooked the possibility that the defendants might not be competing without thereby violating the Sherman Act.

At trial, the only evidence introduced by the government in support of the section 1 charge consisted of descriptions of the correspondent-associate relationship. No evidence with respect to the actual or probable effect of that relationship on prices or services was presented (J.S. App. 27a), and it was therefore clear that the government was proceeding exclusively on a *per se* theory of illegality. That was all that was clear since the government never indicated precisely what aspects of the correspondent-associate relationship it considered to be illegal *per se*. But it seemed most interested in the distribution by C&S to the correspondent associates of memoranda containing information on prices and hours of service, which indicated that it was basing the section 1 charge on *United States v. Container Corp. of America*, 393 U.S. 333 (1969). (See Plaintiff's Post-Trial Brief 12, 58-61; Plaintiff's Proposed Findings of Fact, p. 64.) This was certainly the district court's impression (J.S. App. 24a).

In this Court the government has jettisoned the "close working relationship" theory of the complaint. The *Container* theory of the trial and post-trial submission was dropped in the Jurisdictional Statement but reappears fitfully and imprecisely in the brief on the merits. The Jurisdictional Statement advanced (for the first time) the theory that C&S and the correspondent associates had agreed that the latter would be "vassals" of C&S (J.S. 17), and the Brief in Opposition to Motion to Affirm rang still another change on the section 1 charge: for the first time the defendants were accused of "a classic arrangement fixing actual current prices." (P. 2.) The brief on the merits repeats this charge but downplays the "vassal" theory and substitutes "mutual agreement or understanding that the . . . [five percent] banks will 'voluntarily' submit to C&S's direction." (Brief for the U.S. 27.)

The government's confusion is evident. It may therefore be helpful to the Court to review very briefly the basic law of section 1 before we demonstrate that each of the theories advanced by the government is either without basis in law or foreclosed by a finding of fact of the district court that the government has not challenged as clearly erroneous.

2. **Only naked agreements not to compete are per se violations of section 1; other kinds of agreement must be tested under the Rule of Reason.**

If two firms enter into agreement the main purpose of which is to eliminate price or other forms of completition between them, the agreement is illegal *per se*, that is, without regard to its actual or probable effect on price levels or other conditions in the relevant market. (The firms might be such small factors in the market that their agreement would have no significant effect on the market price.) The first thing to note about this formulation is that it requires an *agreement* between the competing firms.[33] If a small firm decided that it could

[33] Section 1 is, of course, limited to "contracts," "combinations in the form of trust or otherwise," and "conspiracies." These terms denote agreement. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954). The holding of that case was explained by a recent head of the Antitrust Division as follows:

> "One legal point which needs to be made clear at the outset, and one which we have had to bear in mind, is that the antitrust laws do not make uniform prices themselves illegal. The law, as laid down by the Supreme Court, is that an unlawful conspiracy is not established merely by showing that competitors charge the same identical prices or even that they raise their prices in quick succession. Somehow, out of the course of circumstances, the Supreme Court has made clear, the Government must establish that there was collusion in connection with the price change."

Statement of Assistant Attorney General Richard W. McLaren Before the House Banking and Currency Committee, June 21, 1969, p. 2. He was testifying with reference to an investigation of alleged price fixing in banking.

make a good profit charging the same price as one of its large competitors, and did so rather than try to undercut him, this would be a unilateral decision not to compete in price with that competitor and would not violate section 1. The second thing to note is that the rule of *per se* illegality differentiates—and must differentiate—between agreements whose sole or principal object is the elimination of competition and agreements in which the elimination of competition is ancillary to a procompetitive (or other socially desirable) purpose. Otherwise every agreement to merge previously competing firms, however trivial their share of the market, would be a *per se* violation of section 1 since an incidental effect of the merger would be the elimination of competition between the parties to it.[34]

An agreement that eliminates some competition but is not a naked agreement not to compete is, of course, still subject to section 1. But it is tested under a different standard—some form of "Rule of Reason" which permits the reasons for the agreement, its effects on the vigor of competition in the relevant market, and the possibility of achieving its legitimate purposes by means less restrictive of competition, to be weighed in arriving at a decision whether the agreement violates section 1.

The following subparts apply these precepts to the facts of the present case.

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[34] The doctrine of ancillary restraints stems from *Addyston Pipe and Steel Co. v. United States*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899), and has been much emphasized in the academic writings of the present Solicitor General of the United States. See Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, II, 75 Yale L. J. 375, 377-84 (1966).

B. Price Fixing

1. The government has not proved that C&S and the correspondent associates agreed not to compete.

The government has alleged that C&S and the correspondent associates agreed to charge the same prices.[35] But it failed to prove the existence of any such agreement; the district court found that there was no collusive price fixing (J.S. App. 24a) and no other agreement not to compete (J.S. App. 29a); and the government does not challenge these findings as clearly erroneous. Accordingly, they are binding on this Court. Fed. Rule Civ. Proc. 52(a); *United States v. General Dynamics Corp.*, 415 U.S. 486, 508 (1974). In any event, the findings are clearly correct.

The government points to two sorts of evidence in support of its contention that the case "shows a mutual understanding to fix actual current prices which constitutes a classic *per se* offense." (Brief for the U.S. 34.) The first (see *id.* 33-34) is simply the totality of the relationships between C&S and the five percent banks, which "eliminated, or precluded the development of, any substantial competition among the appellee banks . . . and constituted a system of price fixing designed to achieve uniformity among them." (*Id.* 34.) By this reasoning, any merger between competing firms would constitute a price-fixing agreement since it would preclude the development of substantial competition between the parties. We discuss later whether the totality of the relationships between C&S and its correspondent associates can be considered a *per se* violation of section 1; it is plainly not simple price fixing, as the Justice Department alleges for the first time in this Court.

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[35] We confess to some astonishment that such a charge should be made for the first time in the brief in opposition to the motion to affirm the district court's decision.

The only actual evidence on which the government relies to prove price fixing consists of communications by C&S to the correspondent associates regarding price or other business changes by C&S, followed in a few instances by similar changes on the part of one or more correspondent associate.[36] The government does not contend that these communications were in the nature of directives or invitations to agree on a common price policy. The undisputed evidence is that the communications were distributed to the correspondent associates for their information only[37] and with a strict admonition to set prices and other terms and conditions of business independently;[38] the

[36] This evidence is inaccurately summarized in the government's brief (pp. 10-1 , n. 2), which neglects to mention that all memoranda distributed to the correspondent associates were either marked "FOR INFORMATION ONLY" or understood as such (many of these memoranda were copies of directives to C&S branches). (See pp. 11-12, *supra.*) An example of the government's distorted reading of the record is its use of GX 188 (App. E-240) for the proposition that "C&S notified the five percent banks of its intent to raise its service charges" (Brief for the U.S. 11, n. 2). GX 188 is a memorandum from one officer of C&S to another which was *not* distributed to the five percent banks and which states: "At this point, this [reduction in the charge for checking accounts] applies to C&S National Bank in Atlanta only. I'll let you know as the affiliate and 5% banks make their decisions which are affected." This is hardly evidence of concerted action to raise prices; if anything, it is evidence to the contrary. The government, citing DX 302 (App. E-840-59), then states that after C&S "notified" the five percent banks, the latter adopted charges identical to C&S's. What the evidence in fact shows is that the change in service charges was initiated by the Trust Company of Georgia and followed both by C&S and by the five percent banks as well as by a number of other Atlanta banks (App. 697-98, 824, E-840-59). DX 302 also shows that service charges were lowered, not—as claimed by the government—raised.

[37] As mentioned in the preceding note, the statement "FOR INFORMATION ONLY" was stamped on the memoranda (App. 754, 829-30). In a few cases it was inadvertently omitted but the undisputed evidence is that the contents of the memoranda were in all cases solely for the information of the correspondent associates and were so understood by everyone concerned (App. 776-77, 807-08, 829-30). Although the government does not mention the fact, the legend "FOR INFORMATION ONLY" is clearly stamped on several of the memoranda specifically cited by the government as showing price fixing (see App. E-125, E-145-48, E-155).

[38] See pp. 12-13, *supra.*

district court so found (J.S. App. 24a); and the government, far from challenging that finding, refers approvingly to the fact that "the directors and chief officers [of the five percent banks] who testified on the subject all denied that C&S can or does dictate policies or practices to them, or control their actions." (Brief for the U.S. 26.) The issue, therefore, is whether the bare communication of one seller's price to another, followed by the latter's changing his price to conform to the former's, compels an inference of an agreement to fix prices. There is no basis in precedent or policy for such a result. See, *e.g.*, *United States v. National Malleable & Steel Castings Co.*, 1957 Trade Cases ¶ 66,890 (N.D. Ohio), *aff'd*, 358 U.S. 38 (1958); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3rd Cir. 1961); *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949); *United States v. Chas. Pfizer & Co.*, 367 F. Supp. 91 (S.D.N.Y. 1973); *United States v. General Motors Corp.*, 1974-2 Trade Cases ¶ 75,253 (E.D. Mich.) It would place a seller in jeopardy of committing a criminal violation of section 1 every time he announced a price change publicly, since a competitor might decide to follow his lead, which under the government's theory in this case would be conclusive evidence of a price-fixing conspiracy. At all events, the district court expressly found that there was no agreement not to compete (J.S. App. 29a), and this finding, not challenged by the government as clearly erroneous, is binding on this Court.

2. **Even if C&S had dictated the five percent banks' prices there would be no violation of section 1 under the department's description of the five percent banks as de facto branches of C&S.**

The Department's own description of the relationship between C&S and the five percent banks precludes a finding of an actionable agreement to fix prices. It describes the five percent

banks as *de facto* branches of C&S. We agree with this characterization, while insisting that the five percent banks were autonomous in matters relating to pricing, terms and conditions of sale, and solicitation of customers.[39] That a firm may be at once a branch or subsidiary of another firm and fully independent in matters of price and selling terms is not the paradox that the Justice Department would have this Court believe. It is, indeed, the condition required by this Court's decisions establishing the intra-enterprise conspiracy doctrine, although that doctrine is inapplicable to the facts of the present case.

The intra-enterprise conspiracy cases hold that where affiliated firms hold themselves out to the public as independent competitors, they may not agree on the prices that they charge (or make other agreements that independent competitors would be forbidden to make). *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). These cases require in certain circumstances that a subsidiary set prices inde-

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[39] The sense in which the five percent banks may be regarded as "*de facto* branches" of C&S was explained by a C&S executive, who testified that "there's no difference between our relationships with the [formal C&S] branches and the five percenters because what we had to offer was solicited, invited, wanted, received, and our recommendations were readily accepted" (App. 398 quoted at p. 27, n. 16 of the government's brief). This quotation makes clear that there *was* a difference—C&S did not dictate terms and conditions of sale to the five percent banks as it did to its formal branches—and thus that the Department's characterization of the relationship between the five percent banks and C&S as one of "mutual agreement or understanding that the [five percent] banks will 'voluntarily' submit to C&S's direction" (Brief for the U.S. 27) is a distortion. The district judge, who heard all of the evidence on the subject, concluded that there was "no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources" (J.S. App. 29a).

pendently of its parent, as the five percent banks did here. But *these banks were not required* to do this, because the intra-enterprise doctrine was not applicable to them. An essential element of the doctrine—the subsidiary's holding itself out to the public as an independent competitor—was missing here. Far from holding themselves out to be separate and independent firms, the five percent banks held themselves out to the banking public as branches of C&S.

In insisting that the intra-enterprise conspiracy doctrine requires that the subsidiary hold itself out to the public as an independent competitor, we are not indulging in an eccentric interpretation of the cases. That is the Justice Department's own interpretation.[40] But the Department has gone much further. It has stated publicly and authoritatively both (1) that it considers the doctrine applicable only when the challenged conduct involves predatory conduct toward nonmembers of the affiliated group and (2) that it will not enforce the doctrine in the banking industry (unless predatory conduct is shown).[41] It is a matter of more than passing interest that the publicly stated position of the Justice Department with regard to the meaning and application of the intra-enterprise conspiracy doctrine is nowhere mentioned in the government's brief in this case, which, indeed, takes a contrary position (p. 30).

If, then, in the circumstances presented here (no holding out as independent competitors, and no predatory behavior directed against nonmembers of the affiliated group), C&S could lawfully

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[40] Donald I. Baker, *The "Affiliation" Problem in Banking,* remarks prepared for the Federal Bar Association Convention, Sept. 14, 1972, pp. 5, 14. Mr. Baker is the Director of Policy Planning in the Antitrust Division. Nowhere in the remarks is it suggested that Mr. Baker is speaking personally rather than as a high policy-making official of the Antitrust Division.

[41] Letter to Thomas J. O'Connell, General Counsel, Federal Reserve Board, from Richard W. McLaren, Assistant Attorney General, Antitrust Division, Feb. 22, 1971, reported in 516 Antitrust & Trade Reg. Reptr., at D-1.

dictate the prices of a wholly owned subsidiary, can it dictate the prices of a *de facto* subsidiary? We see no reason in law or policy why it cannot. The issue is substance not form. And the substance is that C&S and the five percent banks constitute a "single economic enterprise" (Brief for the U.S. 10, 42). In the banking industry, control relationships are possible without majority stock ownership—indeed, without any stock ownership at all. That is the reason why the Bank Holding Company Act was amended in 1970 to provide that the Federal Reserve Board may, after notice and opportunity for hearing, find that a bank over whose management and policies another bank (or a bank holding company) has a "controlling influence" is a subsidiary of the latter (12 U.S.C. § 1841(d)).

The Justice Department, which has described the five percent banks as "vassals" of C&S, can have no doubt that one bank can control another without owning a majority of its common stock. In its original competitive reports to the Federal Deposit Insurance Corporation with respect to the proposed acquisition, it described the five percent banks as affiliates of C&S and the acquisition as an internal reorganization (see pp. 15-16, *supra*). And in an official policy statement the Department has taken the position that whether a bank shall be permitted to dictate the prices of a less than wholly owned subsidiary will be treated on a case-by-case basis—not by a *per se* rule, as the Department now urges.[42] According to the Depart-

[42] The McLaren letter, note 41, *supra*, states, at n. 3:

> "Under the Bank Holding Company Act as amended, a corporation can be treated as a bank holding company even though it owns only minority interests in some or all of its 'subsidiaries.' Compare *Yellow Cab, Timken*. In such situations any exchange of information would have to be considered on a case by case basis."

The letter talks about "exchange of information" because that was the practice under discussion in the text to which the footnote pertains. The entire context makes clear that the passage is equally applicable to price fixing or other practices that the intra-enterprise conspiracy doctrine, where applicable, forbids.

ment's own construction of the Sherman Act, C&S would not have committed a *per se* violation of the Sherman Act had it dictated the prices charged by the five percent banks, although out of an abundance of caution it avoided doing so, as the trial court found.

C. Exchanges of Price Information

In *United States v. Container Corp. of America*, 393 U.S. 333 (1969), this Court held that a practice whereby competing manufacturers of shipping containers exchanged information about the prices that they were quoting to purchasers violated section 1 of the Sherman Act.[43] There was no express agreement to exchange information, but agreement was inferred from the fact that each seller provided price information to his competitors in the expectation that the recipient would provide similar information to him when he requested it (*id.* at 335). There was thus a bilateral, bargained-for exchange.

The Court did not hold that such an exchange constitutes a *per se* violation of the Sherman Act: "Price information exchanged in some markets may have no effect on a truly competitive price." (*Id.* at 337.) But in the particular conditions of the corrugated-container industry in the Southeast, the Court found that the exchange was unlawful because it had operated to stabilize the price level. The Court emphasized that the exchange had involved the major sellers in what the Court deemed to be a concentrated market.

In the present case no agreement to exchange information was or could have been proved. The only significant information flow was in one direction—from C&S to the correspondent as-

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[43] We emphasize that the agreement in issue in that case was not an agreement to fix prices, but an agreement to exchange price information. The government's brief in the present case tends to blur the distinction.

sociates. There was no understanding that the correspondent associates would reciprocate. Also unlike *Container*, there was no showing here that the provision of information was likely to affect ("stabilize" in *Container*) prices in the relevant market (J.S. App. 27a-28a). Nor could have an effect have been proved. In *Container* price information was exchanged by the leading sellers in the relevant market; in this case it was not. Under any plausible conception of the relevant market the recipients of the information in this case were simply too small for their pricing decisions to affect the market price. While the defendants in *Container* were viewed as occupying a commanding position in a concentrated market, and in those circumstances the exchange of information might have affected the price level, the defendants here do not enjoy, individually or collectively, anything like monopoly power.[44] But there is no need to rely on conjecture: the evidence is undisputed that the five percent banks' prices were set by the market and not by any communications from C&S (see, *e.g.*, App. 690-91, 726, 746-49, 820-22).

Since, moreover, except for C&S Bank of Tucker,[45] the correspondent associates involved in this case had originally been

[44] Even accepting the government's (incorrect) method of determining the relevant geographical market, the maximum combined market share of C&S and the five percent banks was 34 percent (J.S. App. 33a), except in the (alleged) market in which it competed with the Tucker bank, where the combined market share was 42 percent (Plaintiff's Post-Trial Brief 33). In properly defined markets, the combined share of the defendants would be much smaller. In any event, a market share of 34 percent, or even of 42 percent, is not large enough to confer power over price.

[45] C&S's relationship with the Tucker bank presents somewhat different issues under section 1 from its relationship with the other five correspondent associates involved in this case, owing to the fact that Tucker was not originally sponsored by C&S. Although our case is stronger with respect to the other banks, the Department has not established a basis for overturning the district court's finding that the government failed to prove that C&S's relationship with Tucker violated section 1.

created by C&S in geographical markets where C&S could not open new offices by any other method, under no view is this a case in which a firm conspires with its major competitors to reduce the vigor of competition. In short, *Container* requires evidence that the exchange of information occurred under circumstances where it was likely to stabilize or otherwise affect the market price level and no such evidence was offered in this case —just as no evidence of an *exchange* of information was offered either. The evidence in the record, in fact, is to the contrary on both points.[46]

Conscious of its lack of evidence, the government reads *Container* as establishing a *per se* rule banning price communications among competitors[47]—or, more plausibly, would like this Court to adopt such a rule. Apart from the merits of such a rule in general—which would be few[48]—it would cause massive dislocation in the banking industry, where a degree of cooperation among competitors unusual in industrial markets has long been accepted and should not be casually outlawed. The Justice Department is incorrect in arguing that "true" correspondent-banking relationships are purely "vertical." The record refutes this statement (App. 61, 114, 141-42, 148, 247, 250). Small

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[46] For example, one reason why the exchange of information may have had some effect on the price level in the *Container* case was that the information exchanged (bids on orders) was not publicly available. The contrary is true in this case (see App. 734).

[47] This position is refuted by the emphasis that the Court in *Container* placed on concentration and other market-structure variables (irrelevant in a *per se* case) and has been rejected by the circuits. See *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972); *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972).

[48] Such a rule would ignore the importance of information in the competitive process. Competition cannot operate effectively in a context of pervasive ignorance about what competing firms are charging. See *United States v. Container Corp. of America, supra,* at 342 (Mr. Justice Marshall, dissenting); *Maple Flooring Manufacturers Association v. United States,* 268 U.S. 563 (1925); Richard A. Posner, Antitrust: Cases, Economic Notes, and Other Materials 221-22 (1974).

banks commonly enter into correspondent relationships with large banks in the same market (*ibid.*)—with competitors, in other words—and these relationships, while a good deal less extensive than the correspondent-associate relationship involved in this case, involve communications that the Department would be obliged to view as illegal *per se* under the augmented *Container* rule being sought in this case (see App. 51-85, 99-114, 138-39, 271-72).

D. The Totality of Relationships Between C&S and the Correspondent Associates

1. **The correspondent-associate system does not constitute a per se violation of section 1.**

Although the government accuses the defendants of price fixing and of exchanging price information, it does so in order to have familiar pegs on which to hang its section 1 charge; its real objection is to the correspondent-associate system itself. When the government charges that the correspondent associates agreed to become "vassals" of C&S or to "submit to C&S's direction," it cannot mean that they delegated managerial or financial responsibilities to C&S. The record conclusively refutes any such inference (App. 513-14, 689-94, 731-32, 747-50, 820-22). The Department accepts the five percent banks' denial "that C&S can or does dictate policies or proposals to them, or control their actions." (Brief for the U.S. 26.) The accusation must be, rather, that the network of relationships between C&S and the correspondent associates made it unlikely that the latter would conduct themselves as active competitors of C&S. The correspondent associates were staffed by former executives of C&S; they were using the C&S name and distinctive logogram and their customers thought they were formal branches of C&S; they expected eventually to be acquired formally by C&S; and their stock was owned by C&S and by people friendly to C&S,

including its officers and their families. As a result of these factors, there was little competition between C&S and the correspondent associates, but it does not follow that there was a violation of the Sherman Act—let alone a *per se* violation, the only kind alleged.

Not every agreement that restrains competition is a *per se* violation of section 1; an outright merger of the correspondent associates into C&S would not have constituted a *per se* violation of section 1. The *per se* category is reserved for "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5 (1958). The transactions that comprise the correspondent-associate relationship are not the sorts of things that have ever been thought to belong in the *per se* category. Furnishing assistance to a new firm in staffing and operating methods has never been regarded as a *per se* violation of section 1. Nor has acquiring stock in a competing firm, even a controlling interest—otherwise there would be no need for section 7 of the Clayton Act. Nor has the sale of competitors' products under a common trade name—a common and heretofore unquestioned practice in industries as diverse as mattresses and groceries.[49]

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[49] See *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). These are cases where this Court found violations of section 1 of the Sherman Act because of the presence of explicit agreements to divide sales territories (*i.e.*, not to compete). No suggestion was made in these cases that the underlying decision of a group of competitors to sell their products under a common trade name was unlawful, even though such a decision reduces the amount of competition among the firms quite apart from the separate agreement not to compete. See also *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971).

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969)—a case repeatedly cited in the government's brief—illustrates the same

Nor is the aggregation of these relationships somehow more sinister than each considered by itself. On the contrary, when they are aggregated it becomes clear that what is involved here is nothing remotely like cartelizing, the core practice at which the *per se* rule of section 1 is aimed, but is instead best described as a *de facto* merger or joint venture[50]—formal merger having been barred by the state law limiting branch banking. The Justice Department itself has characterized the five percent banks as "affiliates" of C&S and the proposed formal acquisition as nothing more than an "internal reorganization" (App. E-25, E-33-34). Mergers have never been considered *per se* violations of section 1 and it is instructive to consider why. Unlike a price-fixing conspiracy a merger is not a naked agreement to refrain from competing. There is no presumption that firms merge in order to eliminate competition between them—though that is a possible purpose, and an inevitable effect.[51] Similarly, the correspondent-associate relationship was not created in order to enable C&S and the five percent banks to eliminate competi-

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point. Two newspaper companies combined certain functions, such as advertising, in a jointly owned subsidiary. There was no suggestion that the joint venture constituted a *per se* violation of the Sherman Act (even though the parties had no other competitors). But the parties went further and entered into an agreement to fix prices, divide markets, and pool profits, and this further agreement was held to be a *per se* violation. It is just such a further agreement that is absent in the present case.

[50] With the major difference that, to minimize legal risk, C&S did not attempt to dictate the prices or terms at which the five percent banks conducted business.

[51] Cf. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 169 (1964), where the Court pointed out: "it may be assumed that neither [party to a joint venture] will compete with the progeny [*i.e.*, the jointly owned subsidiary]." This did not make the joint venture a *per se* violation of the Sherman Act, but under the government's present theory it would be, since it eliminated competition between each parent and the subsidiary and each parent owned only 50 percent of the common stock of the subsidiary and thus lacked legal control.

tion between them. Such a theory is not only wrong, but as applied to the five banks that C&S sponsored it is fantastic—the correspondent-associate relationship provided the framework for creating these banks. Unlike a price-fixing conspiracy, but like some mergers, the correspondent-associate system had a "redeeming virtue" (*Northern Pacific, supra*, at 5): it enabled C&S to expand in the face of anticompetitive state branch-banking restrictions and thereby increased competition. For this reason alone, the relationship invites a deeper inquiry than is appropriate in price-fixing cases.

Caution must be exercised in the application of the *per se* rules to cooperative relationships in the banking field. The distinctive public interest in bank solvency has led this Court to conclude that the ordinary rules of antitrust law might have to be modified when applied to banking. *United States v. Philadelphia National Bank*, 374 U.S. 321, 372, n. 46 (1963). But we are not even suggesting a modification of the antitrust rules; we urge only that they be interpreted no more broadly in banking than they have heretofore been interpreted in other industries. The unprecedented rule urged by the Department in this case—that cooperation between competitors which results in a diminution of competition is illegal *per se*—would have an especially dislocating impact in the banking industry, where the special concern with bank solvency has resulted in cooperative relationships, fostered and monitored (as here) by the regulatory agencies, that go far beyond what is normally found in industrial markets. Thus a recent article on correspondent banking, cited approvingly by the Justice Department (Brief for the U.S. 37, n. 21), notes the small bank's "frequent reliance on its correspondent for counseling on officer and personnel recruitment, advice on operations methodology and guidance on executive training." Arthur D. Austin & Elinor Harris Solomon, *A New Antitrust Problem: Vertical Integration in Correspondent Banking*, 122 U. Pa. L. Rev. 366, 369 (1973). Although the

Justice Department applauds correspondent banking,[52] its blunderbuss attack on the "close working relationship" between C&S and the correspondent associates places all correspondent relationships in antitrust jeopardy.

2. **The correspondent-associate program is reasonable and procompetitive.**

The government staked its entire case on a *per se* approach. No evidence was introduced to show that the correspondent-associate system in fact restricted competition unreasonably. But had the Rule of Reason been applied, the government could not have established a violation of the Sherman Act by that route either.

First, any restrictive effect of the correspondent-associate relationship was ancillary to a main purpose that was procompetitive: the expansion of C&S in the face of anticompetitive state-law restrictions on branch banking. Whether the five percent banks are viewed as extensions of C&S or simply as the recipients of C&S's support and assistance, it is undisputed that the correspondent-associate status, by giving the five percent banks the use of C&S's name, personnel, operating methods, advice, and other assistance, enabled them to compete more effectively against the other banks in their markets (App. 527, 532-33, 616-17).

Second, any restriction of competition resulting from the fact that the correspondent associates competed *as* C&S banks rather than *with* C&S was surely minimal in extent and significance. Since, as we demonstrate in Part V(C) of our argument, C&S

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[52] See Donald I. Baker, *Antitrust and Correspondent Banking—A Look at Tomorrow's Competition,* remarks prepared for American Bankers Association Annual Convention, Oct. 19, 1971, p. 4. Mr. Baker, as mentioned in a previous note, is the Antitrust Division's Director of Policy Planning.

and the five percent banks were not even in the same banking markets (properly defined), it follows that the amount of competitive overlap between C&S and these banks was very slight, and so the possible competition eliminated by their relationship must have been very slight also. Even if they were in the same markets, the combined market share of C&S and the five percent banks was much too small to enable them, by eliminating competition *inter se*, to affect the price level significantly (see p. 54 and note 44, *supra*). The acquisition of a small firm may violate section 7, a statute that seeks to prevent concentration from reaching levels at which tacit or express collusion becomes feasible, but it can have no immediate effect on price. If two firms each with 40 percent of the sales in a market merge, giving them a combined market share of 80 percent, the resulting firm may be able to raise its price above the competitive level.[53] But a firm that has 30 percent of the market and acquires competing firms that have in the aggregate only two percent of the market cannot, as a result of the acquisition, raise its price above the market level without disastrous consequences for its sales; its market share is too small to confer power over price.[54] Moreover, it is incorrect to view the correspondent-associate relationship as an agreement among previously competing firms. These firms, with the single exception of the Tucker bank, were created by C&S and the fact that they did not compete with C&S did not reduce the amount

[53] Its customers would try to switch to the other firms in the market, but these firms might be incapable of supplying the entire market at costs comparable to those of the dominant firm. See Richard A. Posner, *supra* note 48 at 376-77.

[54] In discussing market-share percentages in the context of the section 1 issue in this case, we are not suggesting that a showing of a monopoly market share is a necessary element in the proof of illegal price fixing. It is not. But it is relevant to characterizing an ambiguous agreement and to ascertaining motive. Price-fixing agreements are ineffectual unless the parties have power over price. The lack of anything approaching a monopoly market share in the present case is evidence that the purpose of the challenged arrangements was not to fix prices.

of competition in the market at all. On the contrary, competition was greater by virtue of the correspondent-associate program than it would have been in the absence of the program.

Third, no less restrictive method of achieving the main purpose of the correspondent-associate system—which was to increase the amount of banking competition in the Atlanta suburbs—was feasible. The government suggests that C&S could have sponsored the five percent banks without entering into a continuing relationship with them. The suggestion is completely unrealistic. Apart from C&S's lack of interest in sponsoring banks not identified with C&S when its goal was to introduce C&S banking into the Atlanta suburbs, the record shows that the continuing relationship that C&S had promised to the five percent banks at the time of their organization was an influential, and frequently a controlling, factor in the decision of the banking authorities to issue charters for the new banks (see p. 10, *supra*). The government itself concedes that a sponsoring bank may properly play a "significant role in determining" a new bank's policies (Brief for the U.S. 43, n. 26).

This case thus fits squarely Mr. Justice Brandeis' classic definition of a reasonable restraint of trade in *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918):

> "[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of the very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

The correspondent-associate relationship promoted competition by enabling C&S to enter the suburban Atlanta banking markets and is lawful under the standard of the *Board of Trade* case.

We ask the Court not to lose sight of the fundamental purpose and character of the correspondent-associate relationship. It was a second-best alternative to the opening of formal C&S branches, a route blocked by state law. It was not an attempt to cartelize the suburban Atlanta banking market; it bears no resemblance to the kinds of agreement that have been held to be *per se* violations of section 1 of the Sherman Act; and tested under the Rule of Reason its lawfulness is manifest.[55]

E. **Conclusion: Affirmance Will Open No "Floodgates"**

There is no basis for the government's apparent concern that unless the correspondent-associate program is suppressed, banks (or other types of firms) having sinister objectives will enter into agreements that will be difficult to distinguish from the relationship between C&S and the five percent banks. The restrictions on branching that underlay the adoption of the correspondent-associate system are unique to the banking industry, and within that industry there is absolutely no evidence that the method used by C&S in this case has ever been or ever will be used abusively, *i.e.*, as a mask for price fixing or division of markets. The Antitrust Division has been very vigilant and active in the banking field and is well aware of arrangements comparable to the correspondent-associate system but has not produced a single example where such an arrangement was used improperly.[56] The present case is the only one in which the Department has challenged such an arrangement, and similar arrangements cannot be initiated in the future without the express prior approval of the Federal Reserve Board after giving notice to the Department (12 U.S.C. §§1841(d), 1842(a)(2)).

The Department's real concern is presumably with other industries. But the court below did not adopt, and we do not

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[55] The government has never suggested that the correspondent-associate system is *in fact* an unreasonable restraint of trade.

[56] See note 32 *supra*, and accompanying text.

contend for, a rule under which (say) General Motors could give the use of its name to Ford, provide Ford with GM executives, operating manuals, etc., without violating the Sherman Act. The combined market shares of the firms involved in such a case, and the lack of a compelling justification for the arrangement rooted in the special constraints imposed by state banking laws, would clearly distinguish that case from this one. Cf. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). The courts are competent to discriminate between the type of arrangement challenged in this case and arrangements that are designed to veil naked restraints of trade.

III. The Correspondent-Associate Relationship Is in Any Event Subject to the Original Exclusive Jurisdiction of the Federal Reserve Board.

In addition to finding that the government had failed to prove that the correspondent-associate relationship unreasonably restrained trade in violation of section 1 of the Sherman Act, the district court also found, in the alternative, that the relationship was subject to the original exclusive jurisdiction of the Federal Reserve Board. The court based its alternative holding on this Court's decision in *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), which held that proceedings before the Board are "the sole means by which questions as to the *organization or operation of a new bank by a bank holding company* may be tested." (*Id.* at 419; emphasis added.)

C&S is a registered bank holding company, and the relationship between it and the five percent banks (except for the C&S Bank of Tucker) arose from, and has continued unchanged since, the organization of those banks by C&S. The bank regulators were fully aware of the correspondent-associate relationship when C&S organized the five banks it is now seeking

to acquire and when it acquired its five percent interest in Tucker. In addition, the Federal Reserve Board conducted an extensive investigation of these relationships in 1967 and 1968 and found no impropriety (J.S. App. 16a-20a, 27a). The district court found that this investigation involved "the more substantial elements of what it [the government] now claims to be section 1 violations" (J.S. App. 27a). The Justice Department, which participated in the investigation, did not object to the Board's conclusion. It did not consider itself aggrieved by the Board's order and did not seek judicial review of that order in a court of appeals within 30 days as required by section 9 of the Bank Holding Company Act, 12 U.S.C. § 1848. Under *Whitney*, it is barred from challenging that relationship for the first time in this case.

The orderly accommodation of the banking and the antitrust laws mandated by *Whitney* requires that the Federal Reserve Board, the agency responsible for administering the Bank Holding Company Act, be afforded an opportunity to consider and if necessary rectify alleged improprieties in the creation of a bank holding company relationship. If the government's present theory of antitrust illegality is correct, C&S, when it established the correspondent-associate relationship with the six five percent banks involved in the section 1 phase of this case, created *de facto* subsidiaries—a matter of utmost interest and concern to the Federal Reserve Board, in view of its comprehensive responsibilities with respect to the "operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related matters. . . ." 12 U.S.C. § 1844(a).[57] The Board performed its responsibility un-

[57] The Department implies that the Federal Reserve Board has jurisdiction under the Bank Holding Company Act to consider only the structure of bank holding company arrangements, and not the current competitive behavior (even *inter se*) of the parties to the structure (Brief for U.S. 45). Yet section 3(c) of the Bank Holding Company Act directs the Board, in reaching decisions requiring ap-

der the Act by fully considering the correspondent-associate relationship. Its investigation of that relationship was conducted informally in accordance with the "powerful tradition" of banking agencies of "working out controversies by methods of negotiation rather than by formal proceedings."[58] If the Board had found a violation of section 1 of the Sherman Act, it could have brought its influence to bear on C&S to correct the violation. The Board also could have referred the matter to the Justice Department, which was participating in the investigation (App. E-217-18). Since the Department did not follow the statutory procedure for contesting the Board's determination, the legality of the subject matter of the Board's investigation—the correspondent-associate relationship—cannot be challenged by the Department in this proceeding.

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proval under section 3(a), to consider, among other things, whether the effect of a proposed acquisition or merger would be to lessen competition substantially or to restrain trade. Surely this means that the Board must consider the competitive relationships that will result from an acquisition or merger. The legislative history, moreover, shows that the whole purpose of the Act was to limit and restrict the *control* and *management* of banks by bank holding companies (H. Rep. No. 609, 84th Cong., 1st Sess., pp. 2-3; S. Rep. No. 1095, 84th Cong., 1st Sess., p. 1). Indeed, the Bank Holding Company Act has provided since 1970 that a bank will be deemed a subsidiary of any other bank or bank holding company which has the power to exercise a controlling influence over the bank's management and policies, 12 U.S.C. § 1841(d).

[58] Kenneth Culp Davis, Administrative Law Treatise § 4.04, p. 249 (1958).

IV. **There Is No Basis in Law or Fact for Overturning the District Court's Finding That the Acquisition of the Five Sponsored Banks by C&S Was Unlikely to Reduce Competition Substantially and Hence Would Not Violate Section 7 of the Clayton Act.**

The district court, passing a number of other contentions of the defendants, found as a fact that the acquisition of the five sponsored banks by C&S[59] was unlikely to lessen competition substantially, since there was not at present, or likely ever to be. substantial competition between C&S and the sponsored banks, due to the network of relationships involved in the correspondent-associate system. Apparently convinced that this finding is unassailable[60]—especially after this Court's decision in *United States v. Trans Texas Bancorporation,* 412 U.S. 946 (1973), *affirming per curiam* 1972 Trade Cases ¶ 74,257 (W.D. Tex.)—the Justice Department in this Court bases its challenge to the district court's dismissal of the section 7 charge entirely on the alleged antecedent violations by C&S of Georgia's branch-banking law and of section 1 of the

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[59] It will be recalled that the FDIC denied C&S's application for permission to merge with the C&S Bank of Tucker, which C&S had not sponsored (App. E-7-9). That acquisition is accordingly not before this Court.

[60] This finding is, of course, governed by the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. *United States v. General Dynamics Corp.,* 415 U.S. 486, 508 (1974). It should be noted that the district court in this case did not adopt proposed findings submitted by the defendants—the practice criticized in *United States v. Marine Bancorporation,* 418 U.S. 602, — (1974), where the Court nonetheless affirmed; the district court here prepared its own findings. It should also be noted that the Federal Deposit Insurance Corporation, the banking agency that approved the proposed acquisitions challenged in this case, is extremely conscientious in weighing the competitive effects of a proposed acquisition—so much so that in one recent case it was found to have applied a stricter standard than the antitrust laws themselves. See *Washington Mutual Savings Bank v. Federal Deposit Insurance Corporation,* 482 F.2d 459 (9th Cir. 1973).

Sherman Act. We shall show that the alleged violations provide no basis for upsetting the district court's judgment and that there is no other ground for questioning the court's finding that the sponsored banks were unlikely ever to become independent competitive factors.

A. The Alleged Violations of Georgia Law and of the Sherman Act Cannot Support a Finding That the Proposed Acquisitions Would Violate Section 7 of the Clayton Act

The government's present theory of the section 7 violation is that the elements of the correspondent-associate relationship which have operated to eliminate competition between C&S and the five banks that it is proposing to acquire violate both Georgia law and section 1 of the Sherman Act. Therefore, the government's argument continues, once these violations are rectified, C&S and the five percent banks will compete with one another, thereby destroying the factual premise of the district court's judgment that a formal acquisition would not lessen competition substantially.

1. *Georgia Law*—The issue of C&S's violation of Georgia law was fully considered by the district court, which found that the steps necessary to place C&S in full compliance with Georgia law would not significantly affect the elements of the correspondent-associate relationship that make the relationship one of friendly rivalry rather than aggressive competition (J.S. App. 66a-68a, 70a-72a). This finding is not challenged as clearly erroneous, and is in any event plainly correct.

The issue of Georgia law arises out of a suit brought by the Independent Bankers Association of Georgia against the State Commissioner of Banking and Finance. The suit charged that the Commissioner had failed to enforce Georgia's bank holding company law (which limits direct or indirect holdings of bank

stock by a bank holding company to five percent of two or more banks) and sought an order of mandamus compelling him to do so. The procedural context is significant. The scope of judicial review of the Georgia Commissioner's enforcement decisions, limited as it is to mandamus proceedings, is extremely narrow; the only judicially cognizable issue is whether the Commissioner has acted. Now that the Commissioner *has* acted, by issuing an order against C&S as directed by the mandamus issued by the Georgia Supreme Court, we can assume that further efforts to attack the correspondent-associate system through the Georgia courts will be unavailing.

The salient features of the Commissioner's order (J.S. App. 81a-87a) are the following:

First, C&S is ordered to make available the full complement of services that it provides the five percent banks to any other bank that might wish to enter into a like correspondent relationship with it; *i.e.*, it cannot discriminate against banks desiring to become correspondent associates of C&S. This part of the order requires no change in C&S's relationship with existing banks, such as the five banks that it proposes to acquire, so long as it is willing to enter into similar relationships with any other banks desiring them—which it is willing to do.[61]

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[61] The Independent Bankers Association of Georgia, in its *amicus curiae* brief in this Court, reads the Commissioner's order as requiring C&S to terminate the correspondent-associate relationship (p. 4). This interpretation, which the Justice Department has not adopted, is incorrect. The order requires C&S to "terminate any direct or indirect supervision of the ten five percent banks beyond that which is available from . . . [C&S] to *any bank that wishes to enter into a correspondent relationship with*" C&S. (J.S. App. 81a; emphasis added.) Since C&S is happy to make available to any bank wishing to enter into a correspondent relationship with it the identical services that it furnishes the five percent banks, the order does not require it to terminate its relationship with the five percent banks. Nor is there anything in the opinions of the Georgia Supreme Court requiring or justifying such an interpretation. See *Independent Bankers Ass'n v. Dunn*, 230 Ga. 345, 197 S.E.2d 129 (1973), modified *sub nom. Citizens & Southern Nat'l Bank v. Independent Bankers Ass'n*, 231 Ga. 421, 202 S.E.2d 78 (1973).

Second, no one may simultaneously be an officer (or director) of both C&S and a five percent bank—but none were at the time of trial in this case, and none are now.

Third, certain policy-making officers of C&S are ordered to divest themselves of any stock that they own in the correspondent associates. But such officers own only a very small fraction of that stock (J.S. App. 45a). Further, since they can if they wish divest the stock to customers and other friends of C&S, compliance with this part of the order creates no risk that a controlling stock interest in the five percent banks will come into unfriendly hands. In any event, the district court expressly found that the stock relationship between C&S and the five percent banks was a relatively minor factor in the cooperative, non-competing relationship between those banks and C&S (J.S. App. 65a).

Fourth, the order requires that the advertising and promotional materials of the five percent banks, including their signs, contain the full name of the bank (*e.g.*, "C&S Bank of North Fulton") rather than just "C&S". The banks may continue to use the name and distinctive logogram of C&S.

It is plain that the order leaves intact the basic features of the correspondent-associate relationship but in any event the impact of the order was a question of fact for the district court, which considered the bearing of the Commissioner's order on the issues in the antitrust case and amended its opinion (J. S. App. 70a-72a) to add an express finding that compliance with the order would not so alter the ties between C&S and the five percent banks as to make it likely that, but for the proposed acquisition, the latter would become independent competitive factors rather than continue as affiliates of C&S. The Justice Department neither objected to the amendment nor challenged the court's finding as clearly erroneous.

2. *Sherman Act*—With respect to the alleged violation of section 1 of the Sherman Act, the government's argument depends, of course, on proving such a violation, which as we have seen it failed to do. But even if a violation of section 1 had been proved, it would not follow that the acquisition of the sponsored banks by C&S was unlawful. The question under section 7 is not whether the defendants have violated the Sherman Act but whether, if so, enjoining the violation will result in substantial competition between C&S and the sponsored banks. The government made no attempt at trial to prove that the alleged section 1 violation was a substantial cause of the noncompetitive relationship between C&S and the five percent banks. That is why in this Court the government declines to identify a specific element of the correspondent-associate relationship as violative of section 1 but instead argues that the entire relationship is the violation: only if the entire relationship is enjoined is there any basis for supposing that the sponsored banks will become independent competitive factors and hence that their acquisition by C&S might result in a lessening of competition.

Suppose, for example, that this Court were to hold that C&S's communication of price information to the sponsored banks violated section 1. Such a finding would not support an inference that but for the section 1 violation C&S and the sponsored banks would have competed, for the price communications were a trivial factor in the noncompetitive relationship between C&S and the other banks.[62] The real cement was the common name, the intention of merging in the future, the fact that the sponsored banks were staffed by former executives of C&S, etc.[63]—not the sporadic distribution of a few memo-

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[62] See pp. 9-14 *supra*. The communications relied upon by the government represent an insignificant fraction of the information supplied by C&S to the correspondent associate banks on matters which raise no section 1 questions. See p. 11, n. 12, *supra*.

[63] A particularly important element was the public identification of the five percent banks as formal branches of C&S, which resulted from the common name and logogram (see p. 12, *supra* and pp. A-1,

randa containing information about C&S's prices (see App. 515, 678-79, 736-37, 758). Enjoining price communications would not create competition between C&S and the sponsored banks that the formal acquisition would eliminate. To prevail under section 7 on the basis of a violation of section 1 the government must demonstrate that the *entire* correspondent-associate relationship violates section 1, and it has failed to do so.

B. There Is No Other Ground Upon Which the District Court's Finding That the Acquisition Would Not Substantially Lessen Competition Can Be Overturned

Without the alleged antecedent violations of Georgia law and of the Sherman Act, the government's section 7 case has no basis at all, as the government's brief on the merits seems virtually to concede. The government has always conceded that C&S and the five banks it proposes to acquire have not competed with each other since those banks were formed, do not compete at present, and will not compete in the future unless the correspondent-associate relationship is dissolved.[64] Hence the only question is whether the sponsored banks, assuming they are not acquired

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A-2 *infra*). A consumer is unlikely to shop around among stores that he believes to be under common ownership and management in search of a lower price or better service; nor will stores so identified think it very fruitful to try to persuade him that there are real differences among the stores—the consumer would just be confused or unbelieving.

[64] The only competition between the parties to the proposed acquisition is the sort of friendly rivalry characteristic of the different branches of a single firm (J.S. App. 64a; App. 475, 503-07). The elimination of such competition cannot result in a substantial lessening of competition in the relevant market. Otherwise a firm could not acquire a wholly owned subsidiary without violating section 7, yet the Justice Department admits that a firm can acquire a firm over which it has majority stock control without thereby violating section 7 (see Brief for the U.S. 55, 57).

by C&S, are likely voluntarily or involuntarily to sever the extensive relationships with C&S that constitute the correspondent-associate system. This is a purely factual question. The district court's resolution of it can be disturbed on appeal only if clearly erroneous. The district court found that the sponsored banks were not likely to cease being correspondent associates of C&S (J. S. App. 65a). The government does not challenge this finding as clearly erroneous—nor could it. It is profoundly unlikely either that the sponsored banks would voluntarily withdraw from the C&S system or that C&S would expel them.

The major assets of the sponsored banks are the goodwill associated with the C&S name—which is the name of each of these banks as well—and the proved methods of successful banking available to them as correspondent associates of C&S. They are unlikely to forfeit these assets by giving up their status as correspondent associates of C&S,[65] especially given the background and orientation of their executives[66] and the pattern of ownership of the banks' shares.[67] (See App. 423-26, E-574-88.) The separation of the Stone Mountain bank from the C&S system is the exception that proves the rule, for unlike the banks involved in the proposed acquisition (1) the Stone Mountain bank had not been sponsored by C&S;[68] (2) its stock was

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[65] And with it the C&S name. It would be an unfair trade practice for a bank that was not a correspondent associate of C&S to use the C&S name. C&S Bank of Stone Mountain gave up the C&S name when it ceased to be a correspondent associate.

[66] Executives of the five percent banks are treated, in effect, as being on leave from C&S, to which they may later return (see p. 10, *supra*).

[67] Nothing in the Georgia Banking Commissioner's recent order requires that stock required to be divested be placed in the hands of individuals not friendly to C&S (see p. 70, *supra*).

[68] The government's statement that Stone Mountain was organized with "some assistance by C&S" (Brief for the U.S. 11) is misleading. All C&S did was refer the organizers of Stone Mountain to a retired employee of C&S for *his* assistance (App. 358, 413).

not dispersed, with C&S the largest stockholder, but instead was controlled by a single family (App. 181-82, 360, 396-97); (3) this family was independent of C&S influence (App. 180, 182-83); (4) there was never any intention to merge Stone Mountain into C&S should state law some day permit such a merger (App. 187, 373); and (5) there was continuing friction between the president that C&S furnished to Stone Mountain when it became a five percent bank and its board of directors, which resisted the introduction of C&S banking methods (App. 171, 182-83, 359-60). None of these conditions has ever occurred at any of the five banks that C&S is proposing to acquire in this case.[69]

Nor is C&S likely to expel the sponsored banks from the C&S system. The immediate effect of expulsion would be to deprive C&S of the suburban outlets that it so badly wants and needs. Now that Georgia's branch-banking law has been liberalized, C&S could apply for permission to open its own branch offices in the suburbs. But the banking authorities might well exercise their discretion to deny permission to branch (see App. E-10-12; CCH Fed. Banking Law Rep. ¶ 3179), since the competition of C&S's branch offices might endanger the survival of the (former) five percent banks, whose position would be a precarious one if they were forced by expulsion from the C&S system to compete without C&S's name and assistance. Thus if C&S expelled the five percent banks it might end up with no suburban outlets at all. And if C&S were given permission to branch, its new branches would be competing with the former

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[69] The separation of the Peachtree Bank from Trust Company of Georgia, which had some relationships comparable to those of C&S and its correspondent associates (but significantly not the same name) (see App. 219-25, 594-99), is even less in point. The separation occurred after the Justice Department sued Trust Company and Peachtree, and because the defendants were unwilling to bear the expenses of the lawsuit (App. 223). The costs of suit have not led to a dissolution of the relationship between C&S and the five percent banks, even in the case of C&S Bank of Tucker, which is not involved in the section 7 phase of this case.

five per cent banks, so that the net effect of expulsion would have been for C&S to have created competition with itself.

These are forceful reasons against C&S's expelling the five percent banks.[70] It is of course *possible* that the five percent banks might some day separate from C&S and become independent competitive factors. But this is a "mere possibility," which the district court was entitled to disregard. *United States v. General Dynamics Corp.*, 415 U.S. 486, 509-10 (1974).

In this Court, the government argues that the facts which make it unlikely that C&S and the five sponsored banks will ever be in a competitive relationship with one another should be ignored. The government proposes that unless one firm has formal legal power to control another, the effect of their merger on competition should be analyzed on the premise—even if a fictitious one—that the firms are completely independent competitors in fact. The effect on competition in the Atlanta banking markets of C&S's acquisition of firms that in the aggregate do two percent of the business of those markets is to be determined *as if* the acquired firms are competitors of C&S, though in fact they are not.

To base the decision of a merger case on a counterfactual premise has no basis either in the statute or in the decisions of

[70] At one point in this case the government argued that C&S would expel the five percent banks if it could not acquire them because the correspondent-associate relationship is not a profitable one for C&S. But there is no evidence to support this conjecture, which is wrong (App. 443-44). C&S can charge the five percent banks, directly or indirectly, for whatever benefits the relationship confers on those banks. It is true that the correspondent-associate relationship is a second-best alternative to an outright acquisition. Had there been no prospect of eventual acquisition at the time the correspondent-associate status was created, C&S might have decided not to create it (even if it had not known that the Justice Department would attack it as a violation of section 1). But that is a different issue from whether, having created the correspondent-associate relationship and maintained it for many years, C&S will now abandon it.

this Court. Only last Term, in *United States v. General Dynamics Corp., supra,* the Court held that market-share percentages establish only a presumption of violation of section 7 which can be rebutted by a showing that the percentages exaggerate the competitive effect of the merger. In that case, proof that the acquired firm's mineral reserves were too depleted to enable it to retain its present market share in the future exonerated the defendants.[71] Any presumption derived from the market shares[72] of C&S and the five percent banks was rebutted here by proof that the market shares of the five percent banks grossly exaggerated the significance of these banks as independent competitive factors in the market. They in fact competed as extensions of, rather than with, C&S and the acquisitions therefore will not increase C&S's market power or reduce the amount of competition in the market.[73]

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[71] As the Court later explained in *United States v. Marine Bancorporation,* 418 U.S. 602, — (1974):

> "We conclude that by introducing evidence of concentration ratios of the magnitude of those present here the Government established a prima facie case that the Spokane market was a candidate for the potential competition doctrine. On this aspect of the case, the burden was then upon appellees to show that the concentration ratios, which can be unreliable indicators of actual market behavior, see *United States v. General Dynamics Corporation,* 415 U.S. 486 (1974), did not accurately depict the economic characteristics of the Spokane market."

[72] This assumes the market was correctly defined. We show below (Part V(C)) that it was not, and hence that the market-share figures on which the government relies are meaningless in any event.

[73] This case thus presents the converse of the situation described in paragraph 8 of the Department of Justice Merger Guidelines, which provides that the Department may challenge the acquisition of a firm that is too small to be considered a significant competitive factor under the standard criteria set forth in the Guidelines but that is for some reason "unusually competitive." 1 CCH Trade Reg. Rep. ¶ 4510, p. 6884 (1968). In logic, the Department should also recognize the converse case where the acquired firm, despite having a significant market share, is not a significant competitive

Furthermore, the position taken by the government in this case—that unless the parties to a proposed merger were under common ownership prior to the merger they should be treated as if they were wholly unrelated and fully competitive entities regardless of the actual facts of their relationship—has already been rejected by this Court, in *United States v. Trans Texas Bancorporation*, 412 U.S. 946 (1973), *affirming per curiam* 1972 Trade Cases ¶ 74,257 (W.D. Tex.), a case in which the government tendered the identical position to this Court. In *Trans Texas* the government had challenged a proposed merger among several banks. Members of an informal group of 49 individuals were majority stockholders in the banks. This "group" was not a single entity in any formal legal sense —no contractual or other formal obligations, or even family ties, united its members. The only cement holding the group together was loyalty to an individual who at the time of trial was 75 years old. No single member of the group held a controlling share in the stock of more than one bank. The banks held themselves out to the public as separate entities—the public was, indeed, completely unaware of the existence of the controlling group—and competed vigorously with each other.[74]

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factor due to special factors such as those involved in the present case.

The government's brief expresses concern with the possibility that, under the approach of the district court in this case, leading firms in a highly oligopolistic market might be permitted to merge upon a showing that they had avoided competition through "conscious parallelism." There is no basis for this concern. A refusal to compete is not a proper defense to a challenge to a merger; such a rule would reward firms for not competing. The basis of the district court's position in this case is not the bare fact that C&S and the five percent banks do not and are unlikely in the future to compete; it is rather the relationship between C&S and the five percent banks, which was procompetitive in purpose and effect since it allowed C&S to expand in the face of anticompetitive state-law limitations on branch banking, albeit an unavoidable side effect was that C&S did not compete with the five percent banks, just as a firm that opens a branch office in a new market will not compete with it.

[74] See Jurisdictional Statement in *Trans Texas*, pp. 8, 22, for examples drawn from the record in that case of the vigorous compe-

They were, of course, legally independent firms in the corporate law sense to which the Justice Department attaches controlling significance in this case (see, *e.g.*, Brief for the U.S. 55-56). Nonetheless the district court in *Trans Texas* found that the probability that the ties among the banks would dissolve, and hence that but for the proposed merger the banks might some day be fully independent competitive factors, was too remote to justify the conclusion that the merger would violate section 7. The Justice Department appealed to this Court, which affirmed, thereby rejecting the government's position—the same position it is urging here. Since the future dissolution of the ties binding the correspondent associates to C&S is even less likely than the dissolution of the informal controlling group of shareholders in *Trans Texas*,[75] this is an *a fortiori* case for affirmance.

Even without the recent decisions of this Court reaffirming the application of the clearly-erroneous rule to the review of district court factfindings in antitrust cases (*Marine Bancorporation, General Dynamics, supra*) the government's sole reliance on market-share percentages would be misplaced in a case of this type. The market-share percentage test was developed for, and has heretofore only been applied in, horizontal merger cases, that is, cases in which the challenged merger eliminates existing competition. The present case is a potential-competi-

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tition between the various banks involved. As the Department correctly pointed out (p. 18), the members of the so-called "control group" "were not bound together by any written agreement; they did not claim to have any legally binding arrangement among them to vote in concert; they never held a formal meeting; and they did not act in concert to control the competitive efforts of the banks." Having lost *Trans Texas,* the Department in arguing the present case has recast the facts of that case (see Brief for the U.S. 54-55).

[75] Because the banks involved in *Trans Texas* were held out to the public as separate and independent competing firms, with different names, etc., dissolution of the relationship among them would not have involved any of the problems discussed at pp. 73-75, *supra*.

tion case, for it is conceded that there is no significant existing competition between the parties to the proposed merger. The contention rather is that the merger eliminates the potential competition of these firms, since although they are not competitors today they might some day become competitors. This is like a case where one firm proposes to acquire another firm that has never sold in the market of the first firm but may some day decide to do so. It has never been thought in a case of that sort that the decision of the acquiring firm to enter the market of the acquired firm could be conclusively presumed. Evidence of the likelihood of the firm's entering (or of exerting competitive pressure on the acquired firm by virtue of the threat of entry) has always been considered an indispensable element of a potential-competition case. See, *e.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). The government introduced no such evidence in this case, and, as we have seen, the record in fact demonstrates that the sponsored banks were unlikely ever to become significant competitors of C&S.

V. The Issues That the District Court Did Not Reach.

The defendants advanced several additional grounds for dismissal of the complaint that the district court did not reach since it found for the defendants on other grounds. We believe that these are grounds that this Court could appropriately decide in the first instance, if necessary in order to terminate this litigation without the necessity of a remand.[76]

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[76] We do not, however, repeat here our argument that the proposed acquisition is protected by the convenience and needs defense of the Bank Merger Act. That argument involves factual questions that must first be resolved by the district court in order to provide a suitable foundation for appellate review. *United States v. Third National Bank in Nashville*, 390 U.S. 171, 183-84 (1968).

A. The Justice Department Is Barred by the Grandfather Clause of the Bank Holding Company Act From Challenging the Relationship Between C&S and Three of Its Correspondent Associates

Three of the correspondent-associate relationships challenged as a violation of section 1 of the Sherman Act were entered into and have existed continuously since prior to July 1, 1966.[77] These relationships are immunized from attack by the government under section 1 of the Sherman Act by the grandfather clause contained in section 11(d) of the Bank Holding Company Act, 12 U.S.C. § 1849(d), which provides that any "acquisition, merger, or consolidation of the kind described in section 3(a)" of the Act which was consummated prior to July 1, 1966, shall be "conclusively presumed" not to have been in violation of any antitrust laws other than section 2 of the Sherman Act. *United States v. Trans Texas Bancorporation,* 1972 Trade Cases ¶ 74,-257, p. 93,214 (W.D. Tex.), *aff'd per curiam,* 412 U.S. 946 (1973).

The government contends that the grandfather clause is inapplicable because the relationships challenged as a violation of section 1 of the Sherman Act do not constitute acquisitions within the meaning of section 3(a) of the Act. It is undisputed, however, that C&S acquired a five percent stock interest in each correspondent associate at the time when the operating relationships were initiated. The government's theory seems to be that the grandfather clause, if it has any meaning at all, protects only the acquisition of the five percent interest but not the relationship that has followed the acquisition. There is no logic to this reasoning. If the grandfather clause did not pro-

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[77] The three banks are C&S Bank of Sandy Springs and C&S Bank of Chamblee, which were organized as C&S correspondent associates in 1959 and 1960, respectively, and C&S Bank of Tucker, which became a C&S correspondent associate when C&S acquired five percent of its stock in 1965.

tect the relationships that followed acquisitions or mergers, it would not provide effective protection from section 1 of the Sherman Act.

We emphasize that formal approval of the Federal Reserve Board under section 3(a) is not a condition precedent to the grandfather protection. The statute applies to acquisitions "of the kind described" in section 3(a), which includes acquisitions by bank holding companies of stock in banks. Unlike other provisions of the Bank Holding Company Act, the protection of the grandfather clause clearly extends beyond acquisitions that required prior Board approval.[78]

B. The Challenged Relationships Are Protected by the Subsidiary Exemption of Section 7 of the Clayton Act

The record in this case clearly shows that C&S caused the formation of all of the correspondent associate banks involved in this litigation, except for Tucker.[79] We have shown that C&S

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[78] *E.g.*, section 11(b), which gives the Justice Department 30 days within which to contest Board decisions, and which was amended in 1970 so that it now covers only an "acquisition, merger, or consolidation *approved under section 3* . . ." (12 U.S.C. 1849(b) (emphasis added)). In addition, section 11(c), which authorizes banking agencies to appear as a party in certain antitrust cases, applies only to actions arising out of "any acquisition, merger, or consolidation transaction *approved by the Board under section 3 of this Act*" (12 U.S.C. § 1849(c) (emphasis added)). If Congress had intended to limit the application of the grandfather clause to transactions requiring Board approval under section 3, it would have repeated the language used in sections 11(b) and 11(c). Clearly, its intentions were broader. The grandfather clause was described as an exemption for "all bank holding company formations or acquisitions before the enactment of the provision if no litigation had been initiated at that time." 112 *Cong. Rec.* 11792 (1966).

[79] The district court made extensive findings on the dominant role played by C&S in the organization of the five banks it is seeking to acquire (J.S. App. 49a).

played the dominant role in the organization of these banks in an effort to extend C&S banking services to areas where C&S could not open branch offices. It follows that the correspondent-associate relationships are protected by the exemption for subsidiaries in section 7 of the Clayton Act. The exemption provides that nothing in the statute shall prevent a corporation "from causing the formation of subsidiary corporations in order to carry on its legitimate business, or branches or extensions thereof, provided that the effect of such formation is not substantially to lessen competition."

The subsidiary exemption has not been interpreted by the courts, and the legislative history is not helpful in determining the intent of Congress in enacting it. But it is surely significant that the exemption focuses on the *formation* and *purpose* of the subsidiary corporation rather than on the amount of stock owned by the parent corporation. The whole *purpose* for the *formation* of the correspondent associate banks by C&S was to carry on the legitimate business of C&S. The subsidiary exemption is applicable only when the effect of the formation of a new subsidiary is not to lessen competition substantially, but the government admits that the formation of the correspondent associates by C&S did not lessen competition in any way.[80]

Although the subsidiary exemption by its terms applies only to section 7 of the Clayton Act, it is basic to antitrust law that the merger prescriptions of section 7 are more stringent than those of section 1 of the Sherman Act. *E.g.*, Report of Attorney General's National Committee to Study the Antitrust Laws,

[80] In fact, the government admitted in the district court that it did not challenge the initial acquisitions by C&S of its five percent interest in each bank because those acquisitions "were competitively insignificant when made" (J.S. App. 64a; see App. E-744, E-817, E-752, E-821). The district court found that the government did not prove any substantial change in the relationships between the date of the initial acquisitions and the date of trial (J.S. App. 65a).

1955, p. 117. Since the formation of each correspondent associate was expressly sanctioned by section 7, it would be anomalous to conclude that the relationships that have naturally resulted from the exempt formation and purpose violate section 1 of the Sherman Act.

C. The Government Failed to Establish the Relevant Sections of the Country in Which the Competitive Effects of the Acquisitions Should Be Analyzed

The government contended in the district court that the relevant market areas were (a) the Atlanta area (consisting of DeKalb and Fulton Counties), (b) DeKalb County, (c) Fulton County, and (d) North Fulton County (that portion of Fulton County north of the Atlanta city limits). The defendants, on the other hand, produced an abundance of economic evidence showing that banking markets in the Atlanta metropolitan area are highly localized in nature (App. 622-25, 859-61) and that C&S and the five suburban banks it is seeking to acquire serve separate market areas. Even the government's own economic expert witness testified that the market areas alleged by the government were too large to constitute banking markets.[81] He testified, for example, that North Fulton County contains two rea-

[81] The government's economic expert testified as follows (App. 320-21):

"Q. Now, these markets which you have located for us in your affidavits, you simply have verified what the Government alleged in its complaint; haven't you?

"A. Not precisely, no.

"Q. Except in one instance, that's where you found two markets in North Fulton County?

"A. I believe there are more instances. I believe that the complaint alleges—draws some very hard lines identifying markets. For example, the complaint alleges that Fulton County is a market. That DeKalb County is a market. As I pointed out in my first affidavit, I think that DeKalb County is probably too large to constitute a banking market. The reason I

sonable approximations of banking markets (App. 321). He also expressed the view that "DeKalb County is probably too large to constitute a banking market" (App. 320). In discussing the alleged Fulton County market, the government's witness testified that the market "would probably be more valid" if the southwestern part of the county were "cut off" (App. 336). If DeKalb and Fulton Counties are each too large to be relevant banking markets, it necessarily follows that the Atlanta area, composed of DeKalb and Fulton Counties combined, is too large.

The only inference that can be drawn from the economic evidence submitted by the government in this case is that suburban banks, such as those involved in this case, are not effective competitors throughout an entire county. This inference, drawn by the government's own witness (App. 320-21, 333-34), is consistent with the evidence submitted by the appellees (App. 626-

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believe that is that there are areas in DeKalb such as Lithonia that should not probably be considered a part of the metropolitan Atlanta, downtown Atlanta banking market. I think the Peoples Bank of Lithonia serves a different market. I think that it, should not, that part of the county should not probably be included in a rigorous definition of market.

"I believe there are also probably some eastern, some areas of the eastern boundaries of the county that should not probably be included in that market.

* * *

"Q. You found two markets in North Fulton County; is that correct?

"A. I believe that there is at least one market in North Fulton County that can be separated from the Fulton County area. There is up in the section that is roughly in the northern tip of Fulton County, there are a couple of banks, several banking offices that are found to have captured or to serve most of the customers who reside in that area. You can come down farther and find a similar pattern.

"Q. And you state at the present time it appears that the North Fulton area contains two reasonable approximations of banking markets?

"A. It may, yes."

27, 873) and leads to the ultimate conclusion that the appellee banks do not compete with each other in any section of the country (App. 626). At the very least, the government failed to prove that its alleged sections of the country are based on economic or competitive realities. For this reason alone, the judgment of the district court on the section 7 issue must be affirmed.

Clearly, the market areas alleged by the government were not correctly defined according to the standards set forth in *United States v. Connecticut National Bank*, 418 U.S. 656 (1974), decided after the trial in the present case. *Connecticut National Bank* makes clear that the government cannot argue, as it did in this case (Plaintiff's Post-Trial Brief 6), that a geographical area need not be a banking market at all to qualify as a section of the country (418 U.S. at —). Moreover, both in *Connecticut National Bank* and in the *Marine Bancorporation* case decided on the same day, this Court ruled that the relevant geographical market of an acquired bank "is the localized area in which that bank is in significant, direct competition with other banks" (418 U.S. —) and that the government must produce evidence to enable a realistic delineation of any local banking markets in which competition is alleged to be affected (*id.* at —) and cannot simply rely on standard metropolitan statistical areas or on political boundaries (*id.* at —). Here the government failed to establish any economically significant geographical markets or submarkets and instead relied on arbitrary boundaries. The government's failure to establish a relevant market in which to appraise the competitive effects of the challenged acquisitions requires affirmance of the district court's decision.

VI. CONCLUSION

For the reasons stated, we urge that the judgment of the district court in favor of the appellees be affirmed.

Respectfully submitted,

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